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## ARTICLES

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### CONSTITUTIONAL STRUCTURE, JUDICIAL DISCRETION, AND THE EIGHTH AMENDMENT

*Bradford R. Clark\**

#### INTRODUCTION

The Supreme Court recently resolved a long-standing split in its Eighth Amendment jurisprudence when it declared that the Cruel and Unusual Punishments Clause gives federal courts broad discretion to exercise “independent judgment” to evaluate the propriety of punishments authorized by state law. Five Justices claimed authority to displace a punishment—however widely employed—based on their own subjective assessment of the penological effectiveness of the punishment and the moral culpability of the particular class of offenders.<sup>1</sup> Notably, these Justices did not attempt to justify their approach in terms of either the text or history of the Eighth Amendment. The remaining Justices read the Clause more narrowly to allow judges to invalidate punishments only when there is objective evidence of a societal consensus against them. Although the Court’s ruling represents an important Eighth Amendment precedent, its resolution of the underlying methodological issue raises a more fundamental question about the proper scope of judicial discretion under the constitutional structure. Specifically, the Court’s assumption of broad discretion to displace state law is in substantial tension with the implications of con-

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1 See *Roper v. Simmons*, 543 U.S. 551 (2005).

stitutionally prescribed lawmaking procedures, the political safeguards of federalism, and the Supremacy Clause. Historically, proponents of broad judicial discretion have invoked specific constitutional provisions in favor of such discretion, while opponents have invoked the constitutional structure against such discretion. In several important historical episodes—involving federal common law crimes and general law under the *Swift* doctrine—the Court first embraced broad policymaking discretion and then abandoned such discretion in the wake of sustained criticism that the judiciary had exceeded its role under the constitutional structure. The resolution of these historical controversies—supported by key aspects of the constitutional structure—counsels against interpreting the Eighth Amendment to delegate broad policymaking discretion to courts absent clear textual and historical evidence to the contrary.

The issue initially arose almost fifty years ago when a plurality of the Court announced in *Trop v. Dulles*<sup>2</sup> that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>3</sup> Over time, members of the Court came to embrace two competing approaches for identifying such evolving standards. *Thompson v. Oklahoma*<sup>4</sup> and *Atkins v. Virginia*,<sup>5</sup> on the one hand, suggest that the Eighth Amendment embodies a broad delegation to the Court to exercise its own independent judgment about the moral and penological propriety of capital punishment in various circumstances. *Stanford v. Kentucky*,<sup>6</sup> on the other hand, suggests that the Court must examine objective indicia to ascertain whether, in fact, a punishment has become “unusual” in the sense that a large proportion of states have rejected its particular application. Last Term, in *Roper v. Simmons*,<sup>7</sup> the Court broke the impasse by overruling *Stanford* and embracing “the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders.”<sup>8</sup>

The Supreme Court did not attempt to tie its embrace of broad judicial discretion to the original understanding or even to a close historical analysis of the Eighth Amendment. In this sense, the Court seemed to embrace such discretion as an inherent part of the judicial

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2 356 U.S. 86 (1958).

3 *Id.* at 101 (plurality opinion).

4 487 U.S. 815 (1988).

5 536 U.S. 304 (2002).

6 492 U.S. 361 (1989), *overruled by Roper v. Simmons*, 543 U.S. 551.

7 543 U.S. 551.

8 *Id.* at 574.

power. Questions about the propriety of such discretion are hardly novel. During the ratification debates, for example, Antifederalists charged that Article III would allow federal courts “to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter.”<sup>9</sup> Federalists countered with assurances that the judiciary would be the “least dangerous” branch<sup>10</sup> because the Constitution would prevent “an arbitrary discretion in the courts”<sup>11</sup> by confining them to the exercise of “judgment” rather than “will.”<sup>12</sup> The Constitution was ratified based in part on these assurances.

The current debate among the Justices over the scope of judicial discretion under the Eighth Amendment goes to the heart of our constitutional structure. By failing to tie its approach to the original understanding of the Eighth Amendment, the Court has in effect adopted a conception of the judicial power that allows judges to act as independent moral agents rather than as mere conduits of society’s value judgments. The question the Court must ask, therefore, is whether its approach is consistent with a proper understanding of the constitutional structure. Two historical examples may shed light on this question. In both instances, federal courts first embraced broad judicial discretion and then abandoned it as inconsistent with the constitutional structure.

First, early in the nation’s history, the judiciary took it upon itself to recognize and enforce federal common law crimes. Federalists generally defended the practice as an inherent part of “the judicial Power of the United States,”<sup>13</sup> while Jeffersonian Republicans charged that the doctrine “would confer on the judicial department a discretion little short of a legislative power.”<sup>14</sup> Although almost all members of the Supreme Court initially embraced federal common law crimes, the Court ultimately rejected the practice as contrary to the constitutional system of checks and balances.<sup>15</sup>

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9 Essays of Brutus No. XI, N.Y. J., Jan. 31, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 417, 419 (Herbert J. Storing ed., 1981).

10 THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

11 *Id.* at 471.

12 *Id.* at 465.

13 U.S. CONST. art. III, § 1; *see* *Henfield’s Case*, 11 F. Cas. 1099, 1106–07 (C.C.D. Pa. 1793) (No. 6360) (reporting Justice James Wilson’s charge to a federal grand jury that “the common law” had been “received in America,” that “the law of nations” to “its fullest extent has been adopted by her,” and that “infractions of that law form a part of her code of criminal jurisprudence”).

14 James Madison, Report on the [Virginia] Resolutions, *in* 6 THE WRITINGS OF JAMES MADISON 341, 380 (Gaillard Hunt ed., 1906).

15 *See* *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

Second, in *Swift v. Tyson*,<sup>16</sup> the Supreme Court claimed authority under Article III to displace state law in favor of so-called general law—that is, law found independently by the Court in light of the general practice of American and foreign courts.<sup>17</sup> After applying and expanding the *Swift* doctrine for almost a century, the Court ultimately held in *Erie Railroad Co. v. Tompkins*<sup>18</sup> that the doctrine amounted to “an unconstitutional assumption of powers by courts of the United States.”<sup>19</sup> According to *Erie*, various aspects of the constitutional structure prevent federal courts from making law on behalf of the United States, and thus foreclose *Swift*’s interpretation of Article III.<sup>20</sup>

These historical instances of judicial discretion and retreat illustrate several interlocking features of the constitutional structure designed to check federal power and preserve the governance prerogatives of the states. The Supremacy Clause recognizes only three sources of law—the “Constitution,” “Laws,” and “Treaties” of the United States—as “the supreme Law of the Land.”<sup>21</sup> The Constitution, in turn, prescribes precise procedures to govern the adoption of each source of supreme federal law. These procedures ensure the operation of the “political safeguards of federalism”<sup>22</sup> by requiring that the states or their representatives in the Senate approve each and every source of law capable of displacing state law.<sup>23</sup> Federal lawmaking procedures also preserve the governance prerogatives of the states simply by making federal law difficult to adopt. They do so by requiring multiple federal actors subject to the political safeguards of federalism to adopt all forms of “the supreme Law of the Land.” Taken together, these features of the constitutional structure suggest that substantial policymaking discretion at the federal level should be confined to the political branches.

In light of these specific safeguards, the Supreme Court should require compelling textual and historical evidence before construing

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16 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

17 *Id.* at 18–19.

18 304 U.S. 64.

19 *Id.* at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

20 *Id.* at 78.

21 U.S. CONST. art. VI, cl. 2.

22 See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954).

23 See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1342–46 (2001).

open-ended provisions of the Constitution to authorize judicial lawmaking unchecked by such safeguards. By design, the Constitution assigns federal lawmaking to actors subject to the political safeguards of federalism and makes such lawmaking relatively cumbersome. Bicameralism and presentment, for example, give states a voice in the lawmaking process and prevent the vast majority of federal proposals from ever becoming law. Construing ambiguous constitutional provisions like the Eighth Amendment to give the judicial branch independent policymaking discretion to displace state law would circumvent both the letter and spirit of the carefully crafted safeguards built into the constitutional scheme.

This Article contains four Parts. Part I describes the long-standing split on the Supreme Court as to whether the Eighth Amendment essentially delegates policymaking discretion to judges to invalidate a particular punishment if it offends their own conceptions of evolving standards of decency. Part II examines the constitutional structure and the ratification debates regarding the proper scope of judicial discretion under the Constitution. Part III reviews two prior cycles of judicial discretion in which federal courts first embraced and then renounced broad policymaking power in the name of the Constitution. Finally, Part IV evaluates the reemergence of judicial discretion in the name of the Eighth Amendment, and concludes that both the text and structure of the Constitution counsel against construing the Amendment to give federal courts broad policymaking discretion.

## I. JUDICIAL DISCRETION AND THE EIGHTH AMENDMENT

The Eighth Amendment provides that “cruel and unusual punishments” shall not be inflicted.<sup>24</sup> The modern Supreme Court has long been divided over the proper approach to understanding this open-textured language. The Court has not purported to rely on the original understanding of the Eighth Amendment<sup>25</sup> and my analysis does not attempt to revisit that choice. It is useful, however, at least to identify several threshold questions in applying the Clause. First, does it apply only to prohibit certain punishments per se or does it also ban particular applications of otherwise permissible punishments? In other words, can a generally permissible punishment (e.g., the death penalty) be considered “cruel and unusual” as applied to a particular

24 U.S. CONST. amend. VIII.

25 See Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CAL. L. REV. 839, 842 (1969) (reviewing evidence from the Founding and suggesting that “the cruel and unusual punishments clause was directed at prohibiting certain methods of punishment” per se).

type of offender (e.g., a minor) or to a particular type of crime (e.g., rape)? Second, is the prohibition on cruel and unusual punishments static or dynamic? In other words, can a court invalidate punishments today that were permissible in 1791?<sup>26</sup> In resolving these questions, the Court has embraced a broad interpretation of the Clause. In a series of cases, the Court has held that an otherwise permissible punishment may become "cruel and unusual" when applied to a certain class of offenses<sup>27</sup> or offenders.<sup>28</sup>

Beyond these threshold issues, the Court must decide how to determine whether the application of a particular punishment is "cruel and unusual." The Court's modern framework originated in *Trop v. Dulles*,<sup>29</sup> a case challenging the constitutionality of a federal statute providing for forfeiture of citizenship upon conviction of wartime desertion. The Court invalidated the statute, but there was no majority opinion.<sup>30</sup> The plurality announced that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>31</sup> Although *Trop* cautioned that the task of interpreting the Constitution "requires the exercise of

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26 In construing the Seventh Amendment's right to trial by jury, for example, the Court traditionally asks whether the litigants would have been entitled to a jury in 1791. See, e.g., *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990); *Tull v. United States*, 481 U.S. 412 (1987).

27 See *Solem v. Helm*, 463 U.S. 277 (1983) (invalidating the imposition of life imprisonment without possibility of parole for a recidivist offender); *Enmund v. Florida*, 458 U.S. 782 (1982) (invalidating the imposition of the death penalty for felony murder); *Coker v. Georgia*, 433 U.S. 584 (1977) (invalidating the imposition of the death penalty for rape). But see *Ewing v. California*, 538 U.S. 11 (2003) (upholding imposition of a prison term of twenty-five years to life for shoplifting by a repeat offender); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding imposition of life imprisonment without possibility of parole for possession of more than 650 grams of cocaine); *Hutto v. Davis*, 454 U.S. 370 (1982) (upholding imposition of a forty-year prison term for possession and distribution of nine ounces of marijuana); *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding imposition of life imprisonment for a recidivist offender).

28 See *Roper v. Simmons*, 543 U.S. 551 (2005) (invalidating execution of offenders under eighteen); *Atkins v. Virginia*, 536 U.S. 304 (2002) (invalidating execution of mentally retarded offenders); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (invalidating execution of offenders under sixteen). But see *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding execution of offenders under eighteen), *overruled by Roper v. Simmons*, 543 U.S. 551; *Penry v. Lynaugh*, 492 U.S. 302 (1989) (upholding execution of mentally retarded offenders), *overruled by Atkins v. Virginia*, 536 U.S. 304.

29 356 U.S. 86 (1958).

30 A plurality held the statute to violate the Eighth Amendment, *id.* at 87 (plurality opinion), while Justice Brennan concurred specially on the ground that the statute "is beyond the power of Congress to enact," *id.* at 114 (Brennan, J., concurring).

31 *Id.* at 101 (plurality opinion).

judgment, not the reliance upon personal preferences,”<sup>32</sup> the plurality gave little guidance as to how courts should identify society’s “evolving standards of decency.”

Members of the Court have embraced two competing approaches for identifying such standards. *Thompson v. Oklahoma*<sup>33</sup> illustrates the independent judgment or judicial delegation model. There, the Court set aside a death sentence imposed on a defendant who committed first degree murder when he was fifteen years old. As in *Trop*, there was no majority opinion. The plurality opinion first looked to “contemporary standards of decency as reflected by legislative enactments and jury sentences,”<sup>34</sup> and concluded that it would offend such standards “to execute a person who was less than 16 years old at the time of his or her offense.”<sup>35</sup> Although acknowledging that “‘the judgments of legislatures, juries, and prosecutors weigh heavily in the balance,’” the *Thompson* plurality nonetheless insisted that “‘it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty’” on a fifteen-year-old offender.<sup>36</sup> In other words, the *Thompson* plurality believed that the “authors of the Eighth Amendment” “delegated” the task of defining the contours of cruel and unusual punishments “to future generations of judges.”<sup>37</sup> Thus, the plurality proceeded to decide, in the exercise of its own indepen-

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32 *Id.* at 103.

33 487 U.S. 815.

34 *Id.* at 823 n.7 (plurality opinion).

35 *Id.* at 830. The plurality noted that in nineteen states, capital punishment is authorized but no minimum age is specified. *Id.* at 826–27. Thus, the plurality confined its “attention to the 18 States that have expressly established a minimum age in their death-penalty statutes.” *Id.* at 829. Because “all of them require that the defendant have attained at least the age of 16 at the time of the capital offense,” *id.* at 829–30, the plurality concluded that the objective indicators of contemporary standards disfavored the death penalty for offenders under the age of sixteen. Justice O’Connor concurred only in the judgment and was reluctant to find a national consensus on the issue “without better evidence than we now possess.” *Id.* at 849 (O’Connor, J., concurring). Instead, she concluded “that the sentence in this case can and should be set aside on narrower grounds than those adopted by the plurality.” *Id.* Because Oklahoma set no minimum age for the death penalty, there is a “considerable risk” that the legislature “did not give the question . . . serious consideration.” *Id.* at 857. Accordingly, Justice O’Connor concluded that defendants “below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age.” *Id.* at 857–58.

36 *Id.* at 833 (plurality opinion) (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)).

37 *Id.* at 821; see also *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (invalidating the death penalty for the mentally retarded based both on a national consensus against the practice and on the Court’s “independent evaluation of the issue”).



dent judgment, “that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty.”<sup>38</sup>

*Stanford v. Kentucky*,<sup>39</sup> by contrast, represents the objective consensus model. There, a majority of the Court upheld the imposition of capital punishment for individuals who were sixteen and seventeen years old at the time of their offenses. The Court explained that “[i]n determining what standards have ‘evolved,’ . . . we have looked not to our own conceptions of decency, but to those of modern American society as a whole.”<sup>40</sup> Accordingly, the Court upheld the sentences at issue based on “objective indicia” such as “statutes passed by society’s elected representatives.”<sup>41</sup> A plurality of the Court went even further by rejecting the “argument that we should invalidate capital punishment of 16- and 17-year-old offenders on the ground that it fails to serve the legitimate goals of penology.”<sup>42</sup> The *Stanford* plurality also “decline[d] the invitation to rest constitutional law upon such uncertain foundations” as “public opinion polls, the views of interest groups, and the positions adopted by various professional associations.”<sup>43</sup>

Last Term, in *Roper v. Simmons*,<sup>44</sup> the Supreme Court overruled *Stanford* and strongly endorsed the independent judgment model.<sup>45</sup> Significantly, in choosing between these competing approaches, the Court did not purport to ground its interpretation of the Eighth Amendment either in the constitutional text or in the specific understanding of the text at the time of its adoption or, indeed, at any subsequent point prior to *Trop*. I take the Court’s underlying framework as my starting point and seek here only to examine the consistency of the competing approaches with broader implications of the constitutional structure.

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38 *Thompson*, 487 U.S. at 823 (plurality opinion). Strictly speaking, the plurality’s second step was unnecessary because it merely confirmed what the objective indicators already revealed about contemporary standards of decency. Nonetheless, there is little doubt that the plurality viewed its independent judgment as the ultimate touchstone of constitutionality.

39 492 U.S. 361 (1989), *overruled by* *Roper v. Simmons*, 543 U.S. 551 (2005).

40 *Id.* at 369.

41 *Id.* at 370.

42 *Id.* at 377 (plurality opinion).

43 *Id.* Justice O’Connor, who joined most of the Court’s opinion, declined to join the plurality on these points because she believed that the Court has “a constitutional obligation to conduct proportionality analysis.” *Id.* at 382 (O’Connor, J., concurring in part and concurring in the judgment).

44 543 U.S. 551.

45 *Id.* at 574–75.

The immediate question before the Court in *Roper* was the constitutionality of Missouri's death penalty as applied to a seventeen-year-old who committed capital murder. Although the Court considered the practice of other states and foreign nations, it ultimately relied on its own independent assessment of the morality and effectiveness of the juvenile death penalty in a maturing society to invalidate the defendant's sentence. Initially, the Court examined the "objective indicia of consensus, as expressed . . . by the enactments of legislatures that have addressed the question."<sup>46</sup> When the Court upheld the juvenile death penalty in *Stanford*, twenty-five states permitted such punishment.<sup>47</sup> *Roper* emphasized that since *Stanford* was decided, "[f]ive States that allowed the juvenile death penalty . . . have abandoned it in the intervening 15 years—four through legislative enactments and one through judicial decision"<sup>48</sup>—and none has changed its law to authorize it. Even with this shift, however, a majority of death penalty states (twenty out of thirty-eight)<sup>49</sup> and a substantial minority of all states (twenty out of fifty) continued to authorize the practice.<sup>50</sup>

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46 *Id.* at 564.

47 *Id.* at 562.

48 *Id.* at 565.

49 Of course, by counting the twelve nondeath penalty states, the *Roper* majority could observe that a "majority of States have [sic] rejected the imposition of the death penalty on juvenile offenders under 18." *Id.* at 568. The dissent objected to "the Court's new method of counting." *Id.* at 610 (Scalia, J., dissenting); see *id.* ("None of our cases dealing with an alleged constitutional limitation upon the death penalty has counted, as States supporting a consensus in favor of that limitation, States that have eliminated the death penalty entirely.").

50 *Id.* at 579 app. A (majority opinion). *Roper* acknowledged that the states had been slower to abolish the death penalty for juveniles than the death penalty for the mentally retarded, but suggested that any difference in the pace of abolition is "counterbalanced by the consistent direction of the change." *Id.* at 566. Here, the Court was attempting to rely on *Atkins*, in which the Court found a national consensus against the death penalty for the mentally retarded based in part on "the consistency of the direction of change." *Atkins v. Virginia*, 536 U.S. 304, 315 (2002). *Roper's* reliance on *Atkins*, however, is arguably misplaced. Between 1989 and 2002, sixteen states abolished the death penalty for the mentally retarded. *Roper*, 543 U.S. at 565. The *Atkins* Court itself found comparison to the (then permissible) juvenile death penalty "telling" because, during the same period, "only two state legislatures have raised the threshold age for imposition of the death penalty." 536 U.S. at 316 n.18. In addition, *Atkins* acknowledged that proportionality review under evolving standards of decency "should be informed by 'objective factors to the maximum possible extent,'" *id.* at 312 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring in part and concurring in the judgment)), and that "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures,'" *id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *overruled by Atkins*, 536 U.S. 304).

If *Roper* rested solely on such “objective indicia,” then reauthorization of the juvenile death penalty by just a few states would suffice to shift the balance back in favor of constitutionality. Even one state could alter the “consistent direction of the change,” and a handful of states could shift the balance back to the levels upheld in *Stanford* and endorsed in *Atkins*. Perhaps for this reason, the *Roper* Court did not rest its decision solely on the purported national consensus against the juvenile death penalty. Rather, the Court characterized its “review of the objective indicia of consensus” as merely a “beginning point” that “gives us essential instruction.”<sup>51</sup> *Roper* went on to explain that the Justices themselves must ultimately “determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.”<sup>52</sup>

Turning to this task, the *Roper* Court took it upon itself to evaluate the sufficiency of “the penological justifications for the [juvenile] death penalty.”<sup>53</sup> The Court began by concluding that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”<sup>54</sup> In the Court’s view, “the diminished culpability of juveniles” means that “the penological justifications for the death penalty apply to them with lesser force than to adults.”<sup>55</sup>

The Court next identified the “two distinct social purposes served by the death penalty” as retribution and deterrence.<sup>56</sup> The Court opined that “the case for retribution is not as strong with a minor as with an adult,” whether “viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim.”<sup>57</sup> With respect to deterrence, the Court thought it “unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles”<sup>58</sup> because “the same characteristics that render juveniles less culpable than adults suggest as well that

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51 *Roper*, 543 U.S. at 564.

52 *Id.*

53 *Id.* at 571.

54 *Id.* at 570. The Court gave three grounds for its moral judgment. First, juveniles are more likely than adults to have a “‘lack of maturity and an underdeveloped sense of responsibility.’” *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). Second, “juveniles are more vulnerable or susceptible to negative influences and outside pressures” than adults. *Id.* Third, “the character of a juvenile is not as well formed as that of an adult.” *Id.* at 570.

55 *Id.* at 571.

56 *Id.*

57 *Id.*

58 *Id.*

juveniles will be less susceptible to deterrence.”<sup>59</sup> In fact, the Court went so far as to suggest that the “likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”<sup>60</sup>

Whatever the merits of the Court’s substantive judgments about moral culpability, retribution, and deterrence, the important point for present purposes is that the Court was willing to determine the constitutionality of the juvenile death penalty based on criteria wholly unrelated to the existence of a national consensus against such punishment. Indeed, the Court expressly claimed that it was free to depart from the “objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question.”<sup>61</sup> In effect, *Roper* interpreted the Eighth Amendment to delegate broad discretion to the Court to exercise its own independent judgment about the moral and penological propriety of the challenged punishment. Accordingly, in the end, *Roper* rests on little more than the subjective opinion of five Justices that “neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders.”<sup>62</sup>

So understood, *Roper* suggests that the Court would not overrule its decision even if all five states that abandoned the juvenile death penalty between 1989 and 2005 now reinstated it. Rather, in order to

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59 *Id.*

60 *Id.* at 572 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988)). This conclusion is somewhat curious in light of the Court’s earlier observation that the defendant in *Roper* had in fact “assured his friends they could ‘get away with it’ because they were minors.” *Id.* at 556.

61 *Id.* at 564.

62 *Id.* at 572. Interestingly, the most widely noted aspect of the *Roper* opinion seems to be its invocation of “the overwhelming weight of international opinion against the juvenile death penalty.” *Id.* at 578; see, e.g., Vicki C. Jackson, *The Supreme Court, 2004 Term—Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006); Jeremy Waldron, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005); Ernest A. Young, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005). The Court observed that “Article 37 of the United Nations Convention on the Rights of the Child . . . contains an express prohibition on capital punishment for crimes committed by juveniles under 18,” *Roper*, 543 U.S. at 576, and that “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty,” *id.* at 575. Although *Roper* acknowledged that in the end such opinion does not control “our outcome,” *id.* at 578, the Court observed that the “opinion of the world community . . . provide[s] respected and significant confirmation for our own conclusions,” *id.*

uphold the juvenile death penalty, a future majority of the Supreme Court would have to conclude—in the exercise of their own independent judgment—that the juvenile death penalty is consistent with their conceptions of moral culpability, retribution, deterrence, and the evolving standards of decency that mark the progress of a maturing society.<sup>63</sup>

The propriety of attributing a regime of independent judicial judgment to an ambiguous constitutional text, of course, is not unique to the Eighth Amendment. Indeed, that question has arisen in connection with various aspects of our constitutional tradition. In each case, the answer depends on a careful assessment of text, history, and structure. As posed in *Roper*, however, the question comes down to whether the phrase “cruel and unusual punishments” should be understood, without specific historical warrant, to *delegate* to the *judiciary* the authority to render independent penological judgments capable of displacing the contrary penological judgments of the state legislatures. The constitutional structure bears on this question because it establishes intricate and precise procedures for adopting federal law capable of displacing state law. Each type of law that results from those procedures—constitutional amendments, laws, and treaties—is expressly referenced in the Supremacy Clause. Moreover, all of the relevant procedures share the common feature of providing express protection for the states through the inclusion of the Senate in the lawmaking process.

## II. THE STRUCTURAL PRESUMPTION AGAINST JUDICIAL DISCRETION

Some degree of discretion, of course, is inherent in the judicial function.<sup>64</sup> It is not unthinkable, moreover, that a constitution would confer virtually unlimited judicial discretion over certain matters. The question, however, is whether it is proper to attribute indepen-

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63 Given the Court's approach, *stare decisis* seems to have little or no bearing on the Court's willingness to shift ground. *Atkins* overruled *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Roper* overruled *Stanford v. Kentucky*, 492 U.S. 361 (1989), without any serious consideration of the doctrine. Presumably, this stems from the dynamic nature of the test employed by the Court, which allows—or requires—the Court to reassess whether a given penalty offends the evolving standards of decency that mark the progress of a maturing society every time the question is brought before it. Accordingly, the Court should have little difficulty overruling *Roper* in the future if it concludes that the decision was erroneous.

64 See *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 475 (2001) (“[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.” (quoting *Mistretta v. United States*, 488 U.S. 361, 417 (1988) (Scalia, J., dissenting))).

dent judicial discretion to open-ended constitutional provisions in the absence of a specific historical showing that those who drafted and ratified the provisions in fact understood them to confer such discretion. This question is especially salient with respect to a constitutional structure like ours, which takes pains to channel federal discretion to displace state law through complicated procedures designed to safeguard federalism. Therefore, the question raised by the Supreme Court's recent Eighth Amendment jurisprudence is this: When the Court employs a framework that does not rely on the original understanding of the constitutional text, what is the appropriate default position for understanding how courts should ascertain evolving standards of decency? This inquiry is informed by similar debates over the appropriate role of judicial discretion under our constitutional structure more generally.<sup>65</sup>

The debate over the permissible scope of judicial discretion under the Constitution began at the Founding. The Founders carefully crafted the constitutional structure to incorporate a series of checks and balances that constrain policymaking discretion by federal actors. These features of the constitutional structure suggest that the Constitution should not be interpreted to give federal courts unchecked policymaking discretion in the absence of a clear delegation by a specific provision of the constitutional text. Consistent with the constitutional structure, Federalists specifically assured anxious citizens during the ratification debates that federal courts would be the least dangerous branch because they would "have neither FORCE nor WILL but merely judgment."<sup>66</sup> Thus, both the Constitution's structure and its history counsel against interpreting the Eighth Amendment to confer substantial policymaking discretion on federal courts.

### A. Structure

The Constitution is carefully structured to restrict both *who* may displace state law on behalf of the United States and *how* they may do so. Specifically, the Constitution prescribes precise procedures to govern the adoption of all forms of "the supreme Law of the Land"—i.e.,

65 Here, I am suggesting a form of intratextualism or, more precisely, intrastructuralism. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (urging interpreters to read a word or phrase in a particular clause in light of identical or similar words or phrases found elsewhere in the Constitution); see also Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 672 (2002) (urging interpreters to "notice key features of the document—its size and shape, its style and layout, its exterior facades and interior motifs—whose significance is lost on most lawyers and judges today").

66 THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 10, at 465.

the "Constitution," "Laws," and "Treaties" of the United States.<sup>67</sup> Although different in crucial respects, all of these procedures assign responsibility for adopting "the supreme Law of the Land" solely to actors subject to the "political safeguards of federalism."<sup>68</sup> These actors include the President, the Senate, and the House of Representatives. As Madison explained, the role of the states in their selection and composition ensures that "each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments."<sup>69</sup> In this way, the Constitution is structured to retard "new intrusions by the center on the domain of the states."<sup>70</sup>

The Constitution magnifies the effect of the political safeguards by denying any single federal actor the power to make federal law unilaterally. Rather, all forms of supreme federal law must be adopted by the Senate acting in conjunction with at least one other participant. For example, the Constitution provides that constitutional amendments ordinarily receive the approval of two-thirds of the House and the Senate and three-fourths of the states.<sup>71</sup> Similarly, the Constitution generally requires federal statutes to be approved by the House, the Senate, and the President.<sup>72</sup> Finally, the Constitution specifies that treaties be submitted by the President and approved by two-thirds of the Senators present.<sup>73</sup> Although the effectiveness of the political safeguards of federalism has waned over time,<sup>74</sup> federal law-making procedures continue to constrain federal lawmaking by establishing multiple "veto gates,"<sup>75</sup> and thus effectively creating a

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67 U.S. CONST. art. VI, cl. 2.

68 The political safeguards of federalism refer to the role of the states in the "composition and selection of the central government." Wechsler, *supra* note 22, at 543.

69 THE FEDERALIST NO. 45 (James Madison), *supra* note 10, at 291.

70 Wechsler, *supra* note 22, at 558.

71 See U.S. CONST. art. V.

72 See *id.* art. I, § 7.

73 See *id.* art. II, § 2, cl. 2.

74 For example, the Seventeenth Amendment has reduced the states' influence in the Senate by replacing appointment of Senators by state legislatures with popular elections. See *id.* amend. XVII. Changes in constitutional law have also limited the states' ability to influence the House of Representatives through control over voter qualifications and districting. See *id.* amend. XV (race); *id.* amend. XIX (sex); *id.* amend. XXIV (poll tax); *id.* amend. XXVI (age). Finally, the states' modern practice of appointing presidential electors on the basis of winner-take-all popular elections has reduced the role of state legislatures in selecting the President and all but eliminated the possibility that the President will be chosen by the House of Representatives voting by states.

75 See McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 707 & n.5 (1992).

supermajority requirement.<sup>76</sup> If any of the specified veto players withholds its consent, then no new federal law is created and state law remains undisturbed.<sup>77</sup>

The constitutional structure suggests, moreover, that the lawmaking procedures prescribed by the Constitution are the exclusive means of adopting “the supreme Law of the Land.” The Senate is the only federal institution specified by these procedures to participate in *all* forms of federal lawmaking. The Founders specifically designed the Senate to represent the states in the new federal government. By requiring the participation and assent of the Senate, the Founders effectively gave the states (through their representatives in the Senate) the opportunity to veto all forms of “the supreme Law of the Land.” As George Mason explained at the Constitutional Convention:

The State Legislatures . . . ought to have some means of defending themselves agst. encroachments of the Natl. Govt. In every other department we have studiously endeavored to provide for its self-defence. Shall we leave the States alone unprovided with the means for this purpose? And what better means can we provide than the giving them some share in, or rather to make them a constituent part of, the Natl. Establishment.<sup>78</sup>

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76 See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 74–75 (2001); William T. Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948, 956; Michael B. Rappaport, *Amending the Constitution To Establish Fiscal Supermajority Rules*, 13 J.L. & POL. 705, 712 (1997).

77 See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1792 (2005) (“A national government that can act only with difficulty, after all, will tend to leave considerable scope for state autonomy.”). Some commentators and judges have even pointed to the existence of the political safeguards of federalism as a reason to curtail or eliminate judicial review of the scope of federal powers. See *United States v. Morrison*, 529 U.S. 598, 647–51 (2000) (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.); *id.* at 660–61 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 (1985); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175 (1980); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1557 (1977). Whatever the merits of this suggestion, see Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91 (2003), it is undisputed that the political safeguards built into the original constitutional structure were meant to preserve the governance prerogatives of the states.

78 James Madison, Notes on the Constitutional Convention (June 7, 1787) (statement of George Mason), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 150, 155–56 (Max Farrand ed., 1966) [hereinafter FARRAND'S RECORDS].



If the federal government were free to displace state law without following constitutionally prescribed lawmaking procedures, it could deprive the states' representatives in the Senate of their essential role in the lawmaking process.<sup>79</sup>

The composition and role of the Senate were central issues at the Constitutional Convention of 1787.<sup>80</sup> The Convention agreed that state legislatures would appoint Senators,<sup>81</sup> but it initially deadlocked over the proper basis for representation in the Senate. The large states favored proportional representation,<sup>82</sup> while the small states sought equal representation.<sup>83</sup> The debate was protracted, and the issue brought the Convention to the brink of collapse.<sup>84</sup> The delegates ultimately broke the impasse by granting the states equal suffrage in the Senate.<sup>85</sup> As Jack Rakove has observed, following these developments, "no one could deny that the Senate was intended to embody the equal sovereignty of the states and to protect their rights of government against national encroachment."<sup>86</sup>

The day after approving the states' equal suffrage in the Senate,<sup>87</sup> the Convention adopted the Supremacy Clause.<sup>88</sup> The Clause was originally suggested by supporters of equal suffrage in the Senate as an alternative to the congressional negative,<sup>89</sup> and reflects an important, if overlooked, bargain inherent in the original constitutional structure. By conferring supremacy only on sources of law that re-

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79 The Founders understood that the Senate's essential role in the lawmaking process would not only preserve the governance prerogatives of the states, *see* THE FEDERALIST NO. 62 (James Madison), *supra* note 10, at 378 ("[T]he equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty."), but also provide an "additional impediment . . . against improper acts of legislation," *id.*

80 *See* Clark, *supra* note 23, at 1360–63.

81 *Id.* at 1359.

82 *Id.* at 1360.

83 *Id.*

84 *Id.* at 1362–63.

85 *Id.* at 1363–64. In exchange, the Convention required bills for raising revenue to originate in the House. *Id.* The proponents of equal suffrage even succeeded in exempting this feature of the constitutional structure from amendment by ordinary means. *Id.* at 1366; *see* U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

86 JACK N. RAKOVE, ORIGINAL MEANINGS 170 (1996).

87 *See* Journal of the Constitutional Convention (July 16, 1787), in 2 FARRAND'S RECORDS, *supra* note 78, at 13, 14.

88 *See* Journal of the Constitutional Convention (July 17, 1787), in 2 FARRAND'S RECORDS, *supra* note 78, at 21, 22.

89 *See* Clark, *supra* note 23, at 1348–55.

quire the Senate's approval (i.e., the "Constitution," "Laws," and "Treaties" of the United States), the Supremacy Clause restricts federal supremacy to measures approved by the states' representatives in the Senate. In other words, the states agreed to the supremacy of federal law (and the corresponding displacement of state law) only on the condition that the Senate (structured to represent the states) would have power to veto all forms of supreme federal law.<sup>90</sup> The Founders understood that these *internal* constraints would make it more difficult to adopt supreme federal law, but thought that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones."<sup>91</sup>

The Constitution also places a significant, albeit limited, *external* check on the exercise of federal lawmaking power: judicial review.<sup>92</sup> By design, federal courts are independent of the political branches and are given no role in adopting "the supreme Law of the Land."<sup>93</sup> Influential Founders thought such independence was crucial for the judiciary to perform its essential function of policing constitutional bounds against the political branches. As Alexander Hamilton stressed in Federalist 78, "[t]he complete independence of the courts

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90 See *id.* at 1339.

91 See THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 10, at 444.

92 Although judicial review is well established, Larry Kramer has recently challenged its historical origins. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001). Dean Kramer's scholarship has sparked substantial debate. See, e.g., Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319 (2003); Philip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1 (2003); Robert F. Nagel, *Marbury v. Madison and Modern Judicial Review*, 38 WAKE FOREST L. REV. 613, 625–32 (2003); Saikrishna B. Prakash & John C. Yoo, *Questions for the Critics of Judicial Review*, 72 GEO. WASH. L. REV. 354 (2003); G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463 (2003).

93 U.S. CONST. art. VI, cl. 2. The Founders considered, but rejected, the idea of giving Supreme Court Justices a formal role in adopting federal statutes. The Virginia Plan originally proposed that a "National Legislature," composed of two branches, with power to enact laws subject to disapproval by "a council of revision" composed of "the Executive and a convenient number of the National Judiciary." James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 FARRAND'S RECORDS, *supra* note 78, at 17, 21. The proposal failed in part because some delegates objected that it would give judges too much power in conjunction with judicial review. For example, Luther Martin explained that because "the Constitutionality of laws . . . will come before the Judges in their proper official character," putting judges on the Council of Revision would give them "a double negative." James Madison, Notes on the Constitutional Convention (July 21, 1787), in 2 FARRAND'S RECORDS, *supra* note 78, at 73, 76.

of justice is peculiarly essential in a limited Constitution.”<sup>94</sup> The courts need both “firmness and independence”<sup>95</sup> in order to serve “as the bulwarks of a limited Constitution against legislative encroachments.”<sup>96</sup> The alternative—unacceptable to the Founders—was that “the legislative body are themselves the constitutional judges of their own powers and that the construction that they put upon them is conclusive upon the other departments.”<sup>97</sup> Instead, the Founders established the judiciary—an independent body with no role in the lawmaking process—to serve as an outside check against unconstitutional lawmaking.<sup>98</sup> Thus, even if the House, the Senate, and the President all conclude that a proposed law is constitutional, courts must nonetheless disregard the law if they conclude that it was not “made in Pursuance” of the Constitution.<sup>99</sup>

Both the internal and external constraints on federal lawmaking suggest that the Constitution does not authorize courts to exercise the kind of policymaking discretion entrusted to the political branches.<sup>100</sup> Such judicial discretion would circumvent the political safeguards of federalism because federal courts, by design, are independent of such safeguards. Allowing federal courts to exercise broad policymaking discretion would also bypass the requirement that the Senate, in conjunction with other actors, approve all forms of federal law capable of displacing state law. Finally, unbounded judicial discretion would operate to nullify the check ordinarily provided by judicial review. When the political branches adopt federal law, the judiciary provides an external check against unconstitutional lawmaking. If federal courts were free to impose their will on society, there would be no external

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94 THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 10, at 466.

95 *Id.*

96 *Id.* at 469.

97 *Id.* at 467.

98 *See id.* at 468 (“[W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.”).

99 U.S. CONST. art. VI, cl. 2; *see* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (“[I]t is also not entirely unworthy of observation, that in declaring what shall be the *Supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.”); Clark, *supra* note 77, at 119–24 (explaining how the Supremacy Clause supports judicial review).

100 *See* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 62–63 (2003) (“Judges are on stronger footing when they purport to be interpreting and applying law—and thus exercising bounded discretion—than when they seem to be resolving disputes on their own initiative and exercising unbounded discretion.”).

check on the exercise of such discretion because the courts themselves would judge the constitutionality of their own actions. For the same reasons that the Founders denied “the legislative body” the opportunity to be “the constitutional judges of their own powers,”<sup>101</sup> the constitutional structure counsels against putting the judiciary in a position to police the exercise of its own policymaking discretion.<sup>102</sup>

Given the safeguards established by the Supremacy Clause, it would be strange to presume that judicial review delegates power to judges—without explicit authorization in a specific clause—to displace state laws based solely on their own independent judgment of the appropriateness of such laws. To the contrary, the constitutional structure suggests that the Constitution entrusts policymaking discretion exclusively to the political branches of the federal government. The Constitution assigns the judiciary the more limited—but essential—role of ensuring that the political branches do not violate “the manifest tenor of the Constitution” in the exercise of their policymaking discretion.<sup>103</sup> Interpreting the Eighth Amendment—or any other open-ended provision of the Constitution—to assign similar discretion to the courts would undermine key aspects of the Founders’ careful design.

### B. *Judicial Discretion and the Founding*

A crucial exchange during the ratification debates suggests that prominent Founders understood the constitutional structure to confine judges to the exercise of “judgment” rather than “will” in declaring “the sense of the law.”<sup>104</sup> Antifederalists charged that federal courts under the proposed Constitution would be dangerous because they would be unaccountable to the people, yet possess wide-ranging discretion to interpret the Constitution according to their own preferences. Federalists countered that the exercise of such discretion would be an *ultra vires* abuse of power. They insisted that federal courts would be the least dangerous branch because of their limited role.

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101 THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 10, at 467.

102 As Chief Justice Marshall explained, “it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.” *Marbury*, 5 U.S. (1 Cranch) at 179–80. Reading the Constitution not as a constraint on judges, but as a license for them to impose their views on society, arguably “would subvert the very foundation of all written constitutions.” *Id.* at 178. Instead of serving as a check against unbridled discretion, the judiciary would become the very instrument for its exercise.

103 THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 10, at 466.

104 *Id.* at 469.

The issue arose when leading Antifederalists—seeking to prevent ratification of the Constitution—charged that the judiciary would be the most dangerous branch of the proposed federal government.<sup>105</sup> In a series of essays, Brutus wrote extensively about the dangers of the new federal judiciary. He began by observing that federal judges “are to be rendered totally independent, both of the people and the legislature, both with respect to their offices and salaries.”<sup>106</sup> Such independence was especially dangerous when coupled with the “power to resolve all questions that may arise on any case on the construction of the constitution, either in law or equity.”<sup>107</sup> This combination, he charged, would enable federal judges to exercise unchecked power because “in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution.”<sup>108</sup> Thus, Brutus “question[ed] whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible.”<sup>109</sup>

The Antifederalists’ charges did not go unanswered. Alexander Hamilton, writing as Publius, countered that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.”<sup>110</sup> Without judicial review by an independent judiciary, he argued, “all the reservations of particular rights or privileges would amount to nothing.”<sup>111</sup> The need for an independent judiciary did not mean, as Brutus charged, that the Constitution authorized courts to exercise unlimited discretion. Rather, Hamilton understood the judicial function to be much more modest. He explained that to “avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.”<sup>112</sup> Directly contradicting Brutus, Hamilton insisted that federal courts would “have neither FORCE nor WILL but merely judg-

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105 As one commentator put it, “we may fairly conclude, we are more in danger of sowing the seeds of arbitrary government in this department than in any other.” Letter from the Federal Framer (Jan. 18, 1788), in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 9, at 315, 316.

106 Essays of Brutus No. XI, *supra* note 9, at 417–18.

107 *Id.* at 419.

108 *Id.* at 420.

109 Essays of Brutus No. XV, N.Y. J., Mar. 20, 1788, *reprinted in* 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 9, at 437, 437–38.

110 *THE FEDERALIST* NO. 78 (Alexander Hamilton), *supra* note 10, at 466.

111 *Id.*

112 *Id.* at 471.

ment.”<sup>113</sup> For this reason, “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution.”<sup>114</sup>

Hamilton recognized the possibility that unscrupulous judges might abuse their power, but he thought this argument proved too much:

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body.<sup>115</sup>

Hamilton believed that the country could avoid the danger of willful judges by appointing individuals with the requisite skill and integrity.

In this regard, Hamilton saw life tenure and salary protection as part of the solution rather than as part of the problem. He thought there would be relatively “few men in the society who will have sufficient skills in the laws to qualify them for the stations of judges.”<sup>116</sup> Moreover, “making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.”<sup>117</sup> Hamilton argued that a “temporary duration in office” would discourage good candidates “from quitting a lucrative line of practice to accept a seat on the bench.”<sup>118</sup> This, in turn, would tend “to throw the administration of justice into hands less able and less well qualified to conduct it with utility and dignity.”<sup>119</sup> Life tenure, by contrast, would attract upstanding individuals less likely to abuse their office by exercising will instead of judgment.

Although the Founders disagreed over the magnitude of the danger posed by judicial independence, the exchange between Brutus and Publius reveals that they were united in their understanding that it would be an abuse of power for federal judges to “substitute their

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113 *Id.* at 465.

114 *Id.*

115 *Id.* at 468–69.

116 *Id.* at 471.

117 *Id.*

118 *Id.*

119 *Id.* at 471–72.

own pleasure to the constitutional intentions of the legislature.”<sup>120</sup> Thus, both the constitutional structure and the Founders’ understanding of Article III suggest that the Constitution “did not grant judges the right to exercise their own unlimited discretion or will instead of judgment.”<sup>121</sup> To the contrary, those who ratified the Constitution expected judges to act with integrity and restraint as “the mere instruments of the law.”<sup>122</sup> Although the Founders’ expectations themselves are not necessarily authoritative, they correspond quite closely with the understanding of judicial power that later became firmly entrenched within our constitutional traditions.

### III. HISTORICAL PRACTICE AND JUDICIAL DISCRETION

The permissible scope of judicial discretion under the constitutional structure is an issue that has periodically divided the polity. In two prominent instances raising the issue, the Supreme Court—and, indeed, the legal community more broadly—concluded after substantial debate that courts should not be presumed to possess such discretion. The Founders understood that the Constitution, like all laws, contained ambiguities that could only be settled over time.<sup>123</sup> As James Madison explained: “All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”<sup>124</sup> In two of the most prominent historical “discussions and adjudications,” the Court adopted an under-

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120 *Id.* at 468–69.

121 Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 53 (1995).

122 Chief Justice Marshall, who participated in the Virginia ratifying convention, reflected the Founders’ sentiments some years later in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824):

Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

*Id.* at 866.

123 See, e.g., John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1729 (2004) (explaining that “open questions about ‘the judicial Power’ came to be settled by practical exposition of the proper role of the courts in our constitutional system”).

124 THE FEDERALIST NO. 37 (James Madison), *supra* note 10, at 229.

standing of our constitutional scheme that is squarely at odds with the notion of delegated judicial discretion to displace state law—discretion of the sort that the Court now claims for itself under the Eighth Amendment. In each case, the judiciary initially embraced judicial discretion only to later reject it emphatically as inconsistent with the constitutional structure.

#### A. *Federal Common Law Crimes*

Following ratification, the first Congress established lower federal courts and specified their jurisdiction in the Judiciary Act of 1789.<sup>125</sup> The following year, Congress adopted the Crimes Act of 1790,<sup>126</sup> which established a handful of federal crimes and their respective penalties.<sup>127</sup> The Crimes Act, however, left large gaps in the federal penal code. Early federal judges, including most of the Supreme Court Justices sitting on circuit, tried to fill the void by following the English practice of recognizing and enforcing nonstatutory common law crimes. These judges gave little, if any, consideration as to whether this practice fit within the constitutional structure.

Federal judges originally adopted federal common law crimes in an attempt to enforce President Washington's Neutrality Proclamation of 1793.<sup>128</sup> Attempting to keep the United States out of the war between Britain and France, Washington proclaimed that the federal government would punish Americans who committed, aided, or abetted hostilities against any of the warring powers. Although there was no federal statute prohibiting such conduct, Washington gave "instructions to those officers to whom it belongs, to cause prosecutions to be instituted against all persons, who shall . . . violate the law of nations, with respect to the powers at war."<sup>129</sup> Notwithstanding Washington's proclamation, the French recruited Americans to serve on

125 Ch. 20, 1 Stat. 73. The discussion in the text draws in part on Clark, *supra* note 23, at 1404–12.

126 Ch. 9, 1 Stat. 112.

127 These crimes included treason, misprision of treason, murder and manslaughter within federal enclaves, misprision of felonies on the high seas or within federal enclaves, piracy, accessory to piracy before and after the fact, counterfeiting the public securities of the United States, stealing or falsifying federal judicial records, perjury and subornation of perjury in federal court, bribery of federal judges, obstruction of federal judicial process, rescuing federal prisoners convicted of capital crimes, prosecuting certain writs or processes against foreign ambassadors and other public ministers, and offering violence to the person of a foreign ambassador or other public minister. *See id.* §§ 2–28, 1 Stat. at 112–19.

128 Proclamation of Neutrality (Apr. 22, 1793), in 32 THE WRITINGS OF GEORGE WASHINGTON 430 (John C. Fitzpatrick ed., 1931).

129 *Id.* at 430–31.



privateers sailing out of American ports to attack British ships. Gideon Henfield agreed to serve as the captain of one such privateer, and was arrested for violating the Neutrality Proclamation after he captured a British ship and brought it to Philadelphia.<sup>130</sup>

Justice Wilson, sitting on the Circuit Court, charged the federal grand jury in *Henfield's Case*.<sup>131</sup> Wilson instructed the grand jury that "the common law" had been "received in America,"<sup>132</sup> that "the law of nations" to "its full extent is adopted by her," and that "infractions of that law form a part of her code of criminal jurisprudence."<sup>133</sup> Accordingly, Wilson instructed that "a citizen, who in our state of neutrality, and without the authority of the nation, takes an hostile part with either of the belligerent powers, violates thereby his duty, and the laws of his country."<sup>134</sup> The grand jury returned an indictment against Henfield.

At trial, Henfield's counsel challenged the court's power to enforce nonstatutory crimes,<sup>135</sup> but Justice Wilson (on behalf of himself, Justice Iredell, and Judge Peters) unequivocally rejected this contention in his charge to the petit jury:

It is the joint and unanimous opinion of the court, that the United States, being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its laws. It has been asked by his counsel, in their address to you, against what law has he offended? The answer is, against many and binding laws. As a citizen of the United States, he was bound to act no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an ex post facto law, but a law that was in existence long before Gideon Henfield existed.<sup>136</sup>

The jury acquitted Henfield without explanation. President Washington quickly urged Congress "to extend the legal code and the jurisdiction of the Courts of the United States to many cases which, though

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130 *Henfield's Case*, 11 F. Cas. 1099, 1110–13 (C.C.D. Pa. 1793) (No. 6360).

131 *Id.* at 1099.

132 *Id.* at 1106.

133 *Id.* at 1107.

134 *Id.* at 1108.

135 *Id.* at 1119 (arguing that "as there was no statute giving jurisdiction, the court could take no cognizance of the offense").

136 *Id.* at 1120. For an insightful analysis of Justice Wilson's approach to federal common law crimes as well as his broader judicial philosophy, see Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113 (2003).

dependent on principles already recognised, demand some further provisions.”<sup>137</sup> In response, Congress enacted the Neutrality Act, establishing new statutory crimes expressly prohibiting conduct like Henfield’s.<sup>138</sup>

Despite Henfield’s acquittal, federal courts continued to enforce federal common law crimes throughout the 1790s.<sup>139</sup> In fact, it was not until 1798, in *United States v. Worrall*,<sup>140</sup> that a federal judge even questioned the legitimacy of federal common law crimes. The case involved an attempt to bribe a federal Commissioner of Revenue. After the jury found Worrall guilty, his counsel, Alexander Dallas, “moved in arrest of judgment, alleging that the Circuit Court could not take cognizance of the crime charged in the indictment.”<sup>141</sup> Dallas argued that the offense cannot “be said to arise under the Constitution, or laws of the United States” because there was no law prohibiting Worrall’s conduct.<sup>142</sup> Dallas also strenuously challenged the proposition “that though the offence is not specified in the Constitution, nor defined in any act of Congress; yet, that it is an offence at common law; and that the common law is the law of the United States, in cases that arise under their authority.”<sup>143</sup> Dallas argued that “[t]he nature of our Federal compact, will not . . . tolerate this doctrine” because “the very powers that are granted [to the federal government] cannot take effect until they are exercised through the medium of a law.”<sup>144</sup>

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137 4 ANNALS OF CONG. 11 (1793).

138 Ch. 50, 1 Stat. 381 (1794). For an extended discussion of *Henfield’s Case* and its aftermath, see David P. Currie, *The Constitution in Congress: The Third Congress, 1793–1795*, 63 U. CHI. L. REV. 1, 4–16 (1996).

139 See *United States v. Ravara*, 27 F. Cas. 714, 714 (C.C.D. Pa. 1794) (No. 16,122a) (upholding the indictment and conviction of the Consul from Genoa for sending anonymous and threatening letters with the intent to extort money, notwithstanding the defendant’s argument that “the matter charged in the indictment was not a crime by the common law, nor is it made such by any positive law of the United States”); *United States v. Smith*, 27 F. Cas. 1147, 1147 (C.C.D. Mass. 1792) (No. 16,323) (permitting a prosecution for passing counterfeit bank bills of the Bank of the United States notwithstanding defense counsel’s objection that “there was no federal statute on the subject; hence only an offense of common law”).

140 2 U.S. (2 Dall.) 384 (1798).

141 *Id.* at 389.

142 *Id.* at 390.

143 *Id.* at 391 (emphasis omitted).

144 *Id.*; see also *id.* (“Congress had undoubtedly a power to make a law, which should render it criminal to offer a bribe to the Commissioner of the Revenue; but not having made the law, the crime is not recognized by the Federal Code, constitutional or legislative; and, consequently, it is not a subject on which the Judicial authority of the Union can operate.”).

William Rawle, the United States attorney, countered that "it is unreasonable to insist, that merely because a law has not prescribed an express and appropriate punishment for the offence, that, therefore, the offence, when committed, shall not be punished by the Circuit Court, upon the principles of common law punishment."<sup>145</sup> Justice Chase interrupted Rawle and inquired: "Do you mean, Mr. Attorney, to support this indictment solely at common law? If you do, I have no difficulty upon the subject: The indictment cannot be maintained in this Court."<sup>146</sup>

Justice Chase explained that the Constitution both confers limited powers on the federal government and restricts the manner in which the government may exercise them.<sup>147</sup> In the case before the court, Chase acknowledged that the power to punish bribery of federal officials "is certainly included in" Congress's necessary and proper power.<sup>148</sup> Thus, according to Chase, the question "does not arise about the power; but about the exercise of the power:—Whether the Courts of the United States can punish a man for any act, before it is declared by a law of the United States to be criminal?"<sup>149</sup> Chase concluded that it is "essential, that Congress should define the offences to be tried, and apportion the punishments to be inflicted, as that they should erect Courts to try the criminal, or to pronounce a sentence on conviction."<sup>150</sup>

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145 *Id.* at 392.

146 *Id.* at 393.

147 *See id.* at 393–94 (stating that "the Constitution of the Union, is the source of all the jurisdiction of the national government; so that the departments of the government can never assume any power, that is not expressly granted by that instrument, nor exercise a power in any other manner than is there prescribed").

148 *Id.* at 394.

149 *Id.* (emphasis omitted).

150 *Id.* Judge Peters disagreed, concluding that the United States possesses the common law "power to punish misdemeanors," and that such power may be exercised either "by Congress in the form of a Legislative act," or by federal courts "in a course of Judicial proceeding." *Id.* at 395. In light of this division of opinion, "the Judges and the Attorney of the District [expressed a wish] that the case might be put into such a form, as would admit of obtaining the ultimate decision of the Supreme Court, upon the important principle of the discussion." *Id.* at 396. Worrall's counsel declined, and the court imposed a mitigated sentence. Commentators debate why Justice Chase agreed to impose a sentence notwithstanding his objections to federal common law crimes. *See* WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC* 147 (1995) (stating that Chase "continued for the rest of his career to reject the federal courts' authority to try criminal prosecutions based upon the common law"); Stephen B. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 *Nw. U. L. REV.* 26, 69 (1978) (suggesting that Chase's view on the question was "malleable, if not a complete turnaround"); Kathryn

Ironically, it was the enactment of a federal criminal statute that set in motion a debate that ultimately forged a consensus both on and off the Court against the constitutionality of federal common law crimes. In 1798, Federalists adopted the infamous Sedition Act, which made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious" words about Congress or the President.<sup>151</sup> Prior to the Act, Federalists had used common law seditious libel prosecutions to punish detractors. Justice Chase's opinion in *Worrall* the same year motivated Federalists in Congress to enact legislation.<sup>152</sup> Jefferson and his party saw the Sedition Act as an attempt to silence political opposition and challenged its constitutionality.<sup>153</sup> The Virginia legislature quickly passed a resolution declaring the Sedition Act to be unconstitutional as an exercise of "a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto."<sup>154</sup>

Federalists like Oliver Ellsworth countered "that the Act presented no 'constitutional difficulty' because the federal courts were already authorized to punish seditious libel as a common-law crime."<sup>155</sup> Federalists pointed out that the effect of the Act was actu-

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Preyer, *Jurisdiction To Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223, 235 (1986) (suggesting that "Chase did not change his mind on the common law question," and crediting Judge Peters's account that he "practiced a pious maneuver & [Chase] joined in pronouncing a very just, but mild Sentence" without realizing "'till too late, that he had pronounced Judgment with a divided Court'" (quoting Letter from Richard Peters to Timothy Pickering (Mar. 30, 1816))).

151 Ch. 74, § 2, 1 Stat. 596, 596 (1798).

152 See CASTO, *supra* note 150, at 148 (noting that "[t]his legislation was motivated in part by Chase's unsettling opinion," which "cast some doubt on the legitimacy of federal common-law prosecutions").

153 Although the Sedition Act would undoubtedly raise First Amendment concerns today, the Amendment did not obviously apply in 1798 because it "was regarded as guaranteeing nothing more than the common law definition of freedom of the press: the freedom to publish without prior restraint." Gary D. Rowe, Note, *The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919, 936 (1992) (citing LEONARD W. LEVY, *THE EMERGENCE OF A FREE PRESS* 220-349 (1985)). Accordingly, opponents challenged the Act primarily on the ground that it was beyond Congress's power to enact.

154 James Madison, [Virginia] Resolutions of 1798, in 6 THE WRITINGS OF JAMES MADISON, *supra* note 14, at 326, 328. Kentucky passed a similar resolution. See Thomas Jefferson, Kentucky Resolutions (Nov. 14, 1799), in 5 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (declaring the alien and sedition laws to be "palpably against the Constitution").

155 CASTO, *supra* note 150, at 149 (quoting Letter from Oliver Ellsworth to Timothy Pickering (Dec. 12, 1798)); see also H.R. REP. NO. 110 (1799), *reprinted in* 9

ally “to mitigate the undue rigor of the common law, and to give opportunity for the person charged to clear himself by proving the truth of his assertion.”<sup>156</sup> On this account, the Sedition Act did not abridge—but actually enlarged—the freedom of speech.

Republicans refocused their attack by denying the central premise of the Federalists’ defense: “‘that the common or unwritten law’ . . . makes a part of the law of these States, in their united and national capacity.”<sup>157</sup> In January 1800, the Virginia Legislature issued a report, written by James Madison, raising two objections to federal incorporation of the common law. First, Madison argued that such incorporation would be inconsistent with the limited and enumerated powers assigned to the federal government.<sup>158</sup> The Report stressed that the federal government is “composed of powers specifically granted, with a reservation of all others to the States or to the people,” and then asked: “In what part of the Constitution . . . is this authority to be found?”<sup>159</sup> After reviewing various provisions, Madison specifically rejected any suggestion that “the common law is . . . adopted or recognised by the Constitution.”<sup>160</sup> Were it otherwise, he explained, “the authority of Congress [would be] co-extensive with the objects of common law.”<sup>161</sup> “The authority of Congress would therefore be no longer under the limitations, marked out in the Constitution. They would be authorized to legislate in all cases whatsoever.”<sup>162</sup>

Second, and more important for present purposes, Madison argued that federal incorporation of the common law “would confer on the judicial department a discretion little short of a legislative

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ANNALS OF CONG. 2989 (1799) (stating that “the act in question cannot be unconstitutional, because it makes nothing penal that was not penal before, and gives no new powers to the court, but is merely declaratory of the common law”).

156 10 ANNALS OF CONG. 415 (1800) (statement of Rep. Robert Harper); *see also* Rowe, *supra* note 153, at 937 (“In sharp contrast to the common law, the Sedition Act permitted the accused to offer truth as an affirmative defense.”).

157 Madison, *supra* note 14, at 372.

158 “[T]he nature of the [common] law of England makes it impossible that it should have been adopted in the lump into such a Government as this is; because it was a complete system for the management of all the affairs of a country.” 9 ANNALS OF CONG. 3012 (1799) (statement of Mr. Nicholas). As Madison explained, because Congress’s power is coextensive with federal judicial power, recognition of a federal common law would mean that “Congress would therefore be no longer under the limitations marked out in the Constitution. They would be authorized to legislate in all cases whatsoever.” Madison, *supra* note 14, at 380.

159 Madison, *supra* note 14, at 372.

160 *Id.* at 382.

161 *Id.* at 380.

162 *Id.*

power.”<sup>163</sup> Because such incorporation would “present an immense field for judicial discretion,” it would require the federal judiciary “to decide what parts of the common-law would, and what would not, be properly applicable to the circumstances of the United States.”<sup>164</sup> According to Madison, giving federal judges this degree of discretion “over the law would, in fact, erect them into legislators.”<sup>165</sup>

The Sedition Act expired in 1801, and the debate over federal common law crimes temporarily subsided with the inauguration of Thomas Jefferson.<sup>166</sup> Jefferson pardoned individuals convicted during the Adams Administration under the Sedition Act, and stressed his view that the Act was unconstitutional.<sup>167</sup> Jefferson’s administration thereafter avoided the question of federal common law crimes by pursuing “prosecutions of Federalist editors for seditious libel . . . in the state courts in 1803, 1804 and 1806.”<sup>168</sup> In 1806, however, Republicans sought to prosecute two Federalist editors, Hudson and Goodwin, for common law seditious libel in federal court, giving rise to the case in which the Supreme Court would ultimately repudiate federal common law crimes.<sup>169</sup> The case did not reach the Supreme Court until 1812. By then, Republican appointees constituted a majority of the Court for the first time and the public increasingly accepted Republican conceptions of the constitutional structure. Although both

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163 *Id.*

164 *Id.* at 381.

165 *Id.*

166 After taking office, Jefferson “discontinued the prosecution against [Federalist editor] William Duane under the now expired Sedition Act.” Preyer, *supra* note 150, at 238.

167 See Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 8 THE WRITINGS OF THOMAS JEFFERSON 310, 311 (New York, G.P. Putnam’s Sons, 1897) (“But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it.”).

168 Preyer, *supra* note 150, at 239. The Republicans’ willingness to pursue common law prosecutions in state court underscores the fact that their objections to federal common law crimes were based primarily on the constitutional structure rather than on a broad view of the freedom of speech.

169 Kathryn Preyer recounts that the controversy began when Connecticut Federalists initiated a prosecution for seditious libel “in the state court (under statutory authority) against the editor of the Jeffersonian Litchfield *Witness*.” *Id.* at 242. “Jefferson’s newly appointed District Judge in Connecticut, Pierpont Edwards, retaliated by inviting the federal grand jury to return common law indictments for libels against the President,” reminding them that “[w]hatever may be my own opinion upon the question, [whether there] are . . . any common law offenses recognizable by the courts of the United States[,] I deem it my duty to declare to you the law, as pronounced by those judges.” *Id.* at 242–43 (quoting Hon. Pierpont Edwards, *The Judge’s Answer*, WITNESS (Litchfield, Conn.), Apr. 30, 1806, at 2).

the Attorney General and the defendants' counsel declined to argue the case, the Court proceeded to the merits.

Justice Johnson delivered the opinion of the Court and declared that federal courts lack judicial discretion to recognize and enforce federal common law crimes. Johnson stated the question broadly as "whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases."<sup>170</sup> Johnson's opinion was brief, reflecting his view that the question had long been "settled in public opinion,"<sup>171</sup> and the "course of reasoning" in support of the Court's conclusion "is simple, obvious, and admits of but little illustration."<sup>172</sup> Johnson noted that the Supreme Court alone "possesses jurisdiction derived immediately from the constitution."<sup>173</sup> Lower federal courts, by contrast, "possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer."<sup>174</sup> The Court, however, found it unnecessary "to inquire whether the general Government, in any and what extent, possesses the power of conferring on its Courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act."<sup>175</sup>

Recalling arguments made in earlier cases,<sup>176</sup> Justice Johnson stated that "[t]he only ground on which it has ever been contended that this jurisdiction could be maintained is, that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it."<sup>177</sup> The Court again found it unnecessary to examine "how far this consideration is applicable to the peculiar character of our constitution."<sup>178</sup> Rather, the Court explained that even if this consideration were "applicable to the state of things in this country, the conse-

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170 *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32 (1812).

171 *Id.* at 32 ("Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion."); *see also id.* ("In no other case for many years has this jurisdiction been asserted, and the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition.").

172 *Id.* at 33.

173 *Id.*

174 *Id.*

175 *Id.*

176 *See United States v. Worrall*, 2 U.S. (2 Dall.) 384, 395 (1793) (opinion of Peters, J.) ("Whenever a government has been established, I have always supposed, that a power to preserve itself, was a necessary, and inseparable, concomitant.").

177 *Hudson & Goodwin*, 11 U.S. (7 Cranch) at 33.

178 *Id.* at 34.

quence [of such implied powers] would not [be the] result . . . which is here contended for.”<sup>179</sup> The Court went on to say that “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”<sup>180</sup>

Although *Hudson & Goodwin* rejected federal common law crimes, the question was not finally settled until four years later in *United States v. Coolidge*.<sup>181</sup> *Coolidge* began in the Circuit Court in Massachusetts when several defendants were indicted for forcibly rescuing a prize.<sup>182</sup> Justice Story, sitting on circuit, posed the question as “whether the circuit court of the United States has jurisdiction to punish offences against the United States, which have not been previously defined, and a specific punishment affixed, by some statute of the United States.”<sup>183</sup> Justice Story “considered the point, as one open to be discussed, notwithstanding the decision in *U.S. v. Hudson*,” because that decision was “made without argument, and by a majority only of the court.”<sup>184</sup> Justice Story sought to allay fears of unbridled judicial discretion by narrowing the range of common law crimes cognizable in federal court. Thus, he purported to ascertain “what are [the] crimes and offences against the United States” by reference to “the principles of the common law, taken in connexion with the constitution.”<sup>185</sup> “Without pretending to enumerate them in detail, I will venture to assert generally, that all offences against the sovereignty, the public rights, the public justice, the public peace, the public trade and the public police of the United States, are crimes and offences against the United States.”<sup>186</sup> Justice Story concluded that the offense

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179 *Id.*

180 *Id.* The Court acknowledged that “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,” such as the power to “fine for contempt—imprison for contumacy—[and] enforce the observance of order.” *Id.* The Court insisted, however, that “all exercise of criminal jurisdiction in common law cases . . . is not within their implied powers.” *Id.*

181 14 U.S. (1 Wheat.) 415 (1816).

182 *Id.* at 415.

183 *United States v. Coolidge*, 25 F. Cas. 619, 619 (C.C.D. Mass. 1813) (No. 14,857), *rev’d*, 14 U.S. (1 Wheat.) 415.

184 *Id.* at 621. Justice Story began by noting that section 11 of the Judiciary Act of 1789 gave the circuit courts “‘exclusive cognizance of all crimes and offences cognizable under the authority of the United States.’” *Id.* at 619 (quoting ch. 20, 1 Stat. 73, 79 (1789)). Story denied that this jurisdiction is limited to “crimes and offences specially created and defined by statute,” *id.*, because the jurisdiction “could not . . . have been given in more broad and comprehensive terms,” *id.* at 620.

185 *Id.* at 620.

186 *Id.*



charged—forcibly rescuing a prize—met this test and declared the proper punishment to be the common law “penalty of fine and imprisonment.”<sup>187</sup>

Before *Coolidge* reached the Supreme Court, Justice Johnson also had occasion to revisit the question of federal common law crimes on the Circuit Court. William Butler was indicted for piracy in South Carolina federal court for both common law and statutory crimes. Although the case is unreported, Johnson apparently arranged to have his opinion printed as a “Pamphlet to the Public.”<sup>188</sup> Johnson’s opinion held that the Crimes Act of 1790 did not reach the defendant’s conduct,<sup>189</sup> and then proceeded to examine “whether the Courts of the United States possess common law jurisdiction in criminal cases.”<sup>190</sup> Justice Johnson began by noting that “advocates for this kind of jurisdiction . . . do not contend for the adoption of the entire system of the Common Law.”<sup>191</sup> But this very concession, intended to alleviate one type of constitutional objection, only served to underscore another. Recalling Madison’s objections, Johnson explained that “if the courts of the United States are to be at liberty to select such parts [of the common law] as in their judgment are applicable,” then they must “erect themselves into legislators in the selection.”<sup>192</sup>

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187 *Id.* at 621. In the alternative, Story attempted to distinguish *Hudson & Goodwin* on the ground that “however broad in its language,” the decision did not involve “offences of admiralty and maritime jurisdiction.” *Id.* According to Story, “[t]he admiralty is a court of extensive criminal, as well as civil jurisdiction.” *Id.* Although Justice Story acknowledged that the Judiciary Act gives federal courts express jurisdiction “in civil cases of admiralty jurisdiction, but not in criminal cases,” he nonetheless contended that “criminal cases are necessarily included in the grant of cognizance of all crimes and offences cognizable under the authority of the United States.” *Id.* (quoting ch. 20, 1 Stat. at 79).

188 Trial of William Butler for Piracy 3 (C.C.D. S.C. 1813) (copy on file with the Notre Dame Law Review).

189 *Id.* at 6–10.

190 *Id.* at 10.

191 *Id.* at 21. Apparently responding to Justice Story’s approach in *Coolidge*, Justice Johnson mocked the suggestion that federal common law crimes meaningfully could be narrowed to “offences, against the sovereignty, the public rights, the public justice, the public peace, public trade, public police, &c. &c.” *Id.* at 19.

192 *Id.* at 21. Another passage confirms that Justice Johnson’s objection to federal common law crimes was based more on judicial evasion of constitutionally prescribed lawmaking procedures than on a lack of federal power:

Can anyone doubt of the power of Congress under this [Necessary and Proper] clause, to pass laws, fully commensurate or even surpassing the Common Law provisions, for the punishment of offences against the sovereignty, rights, justice, peace, trade, or police of the United States? And why have they not done it in any particular case? Unquestionably, because they did not think it necessary. Why then should it be competent to the Courts of

Johnson thought the exercise of this degree of judicial discretion would be unconstitutional, and concluded “with much regret that we thus decide in favor of so flagrant an offender.”<sup>193</sup>

When *Coolidge* finally reached the Supreme Court in 1816, the result was anticlimactic. The Attorney General stated that he had “examined the opinion of the court . . . in the case of the United States v. Hudson and Goodwin,” that he “consider[ed] the point as decided in that case.”<sup>194</sup> Justice Story responded, “I do not take the question to be settled by that case.”<sup>195</sup> Justice Johnson declared, “I consider it to be settled by the authority of that case.”<sup>196</sup> Justice Washington indicated his willingness to consider the question “[w]henever counsel can be found ready to argue it.”<sup>197</sup> Finally, Justice Livingston stated that he was “disposed to hear an argument on the point,” but that “until the question is re-argued, the case of the United States v. Hudson and Goodwin must be taken as law.”<sup>198</sup> Justice Johnson then delivered the opinion of the Court, stating simply that in the absence of argument “the court would not choose to review their former decision in the case of the United States v. Hudson and Goodwin, or draw it into doubt.”<sup>199</sup>

Although now largely forgotten,<sup>200</sup> the Supreme Court’s repudiation of federal common law crimes played a significant role in curbing judicial discretion under the constitutional structure. Because the Court resolved the question early in the nation’s history, one might erroneously assume that the practice never had any real support. In fact, “the *Hudson* Court disapproved at least eight circuit court cases, [and] brushed off the views of all but one Justice who sat on the Court prior to 1804.”<sup>201</sup> Similarly, because the issue seems fairly narrow today, it is easy to overlook the fact that the debate over federal com-

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the United States, to assert that it is necessary, and proceed to punish offences against which Congress has not thought proper to legislate? Surely we should wait until summoned to the aid of the general government, or we may be deemed officious, forward and intrusive.

*Id.* at 26–27.

193 *Id.* at 35.

194 *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 415 (1816).

195 *Id.* at 416.

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.*

200 See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 245 n.39 (1982) (noting that “the United States has never had a federal common law of crime”).

201 Rowe, *supra* note 153, at 920.

mon law crimes went quite explicitly to the very nature of judicial power under the constitutional structure both as it relates to the legislative powers of Congress and as it relates to the powers reserved by the Constitution to the states. The decision to abandon nonstatutory federal crimes reflects the Court's recognition that the constitutional structure limits not only the scope of federal power, but also the manner in which the government may exercise such power. More specifically, the rejection of federal common law crimes provides significant confirmation of the view, embraced by prominent Founders, that the Constitution requires federal courts to confine themselves to the exercise of judgment rather than will.

### B. *The Swift Doctrine*

A second—and, to contemporary lawyers, more familiar—controversy further illustrates the settled understanding that the attribution of open-ended judicial discretion to disregard state law contradicts the interrelated features of the constitutional structure that govern federal lawmaking and safeguard federalism. The controversy arose in the nineteenth century from the Supreme Court's application and expansion of so-called "general common law" in diversity cases. Justice Story was again a central figure. In *Swift v. Tyson*,<sup>202</sup> Justice Story held on behalf of the Court that federal courts may disregard state court decisions and exercise independent judgment on questions of general law.<sup>203</sup> Although the *Swift* doctrine originated with a question of commercial law, it gradually expanded to encompass a wide array of matters traditionally governed by local law. Nearly a century later, following sustained criticism, the Court declared the *Swift* doctrine to be unconstitutional in *Erie Railroad Co. v. Tompkins*.<sup>204</sup> In so doing, the Court invoked principles of judicial federalism derived from federal lawmaking procedures, the political safeguards of federalism, and the Supremacy Clause.

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202 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

203 *Id.* at 19. Art Wilmarth has pointed out that James Wilson—a strong proponent of federal common law crimes—arguably anticipated *Swift* by advocating a separate branch of equity jurisdiction to develop and apply a uniform mercantile law in American courts. See Wilmarth, *supra* note 136, at 163–64.

204 304 U.S. 64, 77–78 (explaining that the Court would not ordinarily “abandon a doctrine so widely applied throughout nearly a century,” but that “the unconstitutionality of the course pursued has now been made clear and compels us to do so”).

## 1. The Origins of the *Swift* Doctrine

Although *Swift* was arguably defensible when decided,<sup>205</sup> it quickly expanded into “‘an unconstitutional assumption of powers by courts of the United States.’”<sup>206</sup> *Swift* began as a suit between citizens of different states that raised an unsettled question of commercial law—whether acceptance of a negotiable instrument in satisfaction of a preexisting debt constituted consideration sufficient to confer upon the recipient the status of “a bonâ fide holder.”<sup>207</sup> Although several prior New York decisions suggested that such consideration was inadequate,<sup>208</sup> the Supreme Court exercised independent judgment to conclude that release of a preexisting debt was sufficient consideration.<sup>209</sup> The Court considered the question to be one of “general commercial law,”<sup>210</sup> upon which the Court was free “to express our own opinion.”<sup>211</sup>

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205 The following analysis of *Swift* is drawn in part from my earlier writings on the case. For further discussion, see Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1277–92 (1996).

206 *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

207 *Swift*, 41 U.S. (16 Pet.) at 16.

208 In *Coddington v. Bay*, 20 Johns. 637 (N.Y. 1822), the New York Court for the Correction of Errors recognized “[t]he general rule . . . that where negotiable paper is transferred for valuable consideration, and without notice of any fraud, the right of the holder shall prevail against the true owner,” *id.* at 644–45 (opinion of Woodworth, J.). The court, however, concluded that the defendants in *Coddington* were not entitled to the benefit of the rule because they had not given “valuable consideration” for the notes. *Id.* at 648. Strictly speaking, the question whether the release of a preexisting debt constitutes valuable consideration was not presented in *Coddington* because the defendants admitted that at the time they received the notes, the persons from whom they received them “were not, in a strict legal sense, indebted to [the defendants] in any amount whatever.” *Id.* at 644. Nonetheless, several of the opinions suggested that an antecedent debt is not a valuable consideration under the rule. *See id.* at 648; *id.* at 651 (opinion of Spencer, C.J.); *id.* at 655 (opinion of Viele, Sen.). Although the Supreme Court for the Correction of Errors had not “pronounced any positive opinion upon” the question when *Swift* was decided, *see Swift*, 41 U.S. (16 Pet.) at 18, several lower court decisions had ruled in accordance with *Coddington*’s dicta, *see, e.g.*, *Payne v. Cutler*, 13 Wend. 605 (N.Y. Sup. Ct. 1835); *Rosa v. Brotherson*, 10 Wend. 85 (N.Y. Sup. Ct. 1833); *Wardell v. Howell*, 9 Wend. 170 (N.Y. Sup. Ct. 1832). The Court in *Swift* noted that “the more recent [New York] cases . . . have greatly shaken, if they have not entirely overthrown [the earlier] decisions,” 41 U.S. (16 Pet.) at 17, but the Court was willing to assume *arguendo* that “the doctrine [was] fully settled in New York” that “a pre-existing debt was not a sufficient consideration to shut out the equities of the original parties in favor of the holders,” *id.* at 17–18.

209 *Swift*, 41 U.S. (16 Pet.) at 19–21.

210 *Id.* at 18.

211 *Id.* at 19.

At the time *Swift* was decided, states did not clearly consider questions of general commercial law to be governed by local law. Historically, such questions were governed by the law merchant, a branch of the law of nations. This did not mean, however, that courts were free to exercise unbridled discretion. Rather, as Blackstone explained, the law merchant was "a particular system of customs . . . which, however different from . . . the common law, is . . . allowed, for the benefit of trade," and "which all nations agree in and take notice of."<sup>212</sup> Such law was traditionally based on the commercial customs and practices of merchants and was applied by all "civilized" nations to resolve disputes among merchants from different countries.<sup>213</sup> Nations and states followed the law merchant in order to facilitate international and interstate trade by establishing uniform rules to govern transactions among diverse citizens.<sup>214</sup>

In the early nineteenth century, both federal and state courts "considered themselves to be deciding questions under a general law merchant that was neither distinctively state nor federal."<sup>215</sup> For this

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212 WILLIAM BLACKSTONE, 1 COMMENTARIES \*75, \*273.

213 See *id.* at \*75 ("[A] particular system of customs . . . called the custom of merchants, or *lex mercatoria* . . . is . . . allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions . . .").

214 See *id.* at \*273 ("[A]s these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by . . . the law merchant or *lex mercatoria*, which all nations agree in and take notice of."); ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE, IN CIVIL AND CRIMINAL CASES, AND A TREATISE ON BILLS OF EXCHANGE, AND PROMISSORY NOTES, at ix (Arno Press 1972) (1810) ("In questions of commercial law, the decisions of Courts, in all civilized, and commercial nations, are to be regarded, for the purpose of establishing uniform principles in the commercial world."). See generally Francis M. Burdick, *What Is the Law Merchant?*, 2 COLUM. L. REV. 470 (1902). William Fletcher points out that "[t]he concept of a uniform law merchant was quite naturally imported into the treatment of commercial law by American courts," William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1518 (1984), because the general common law was regarded at the time as a great "universal law," "regularly and constantly adhered to," 4 BLACKSTONE, *supra* note 212, at \*67.

215 Fletcher, *supra* note 214, at 1554. *Swift* made this point explicitly: "It is observable, that the Courts of New York do not found their decisions [regarding the adequacy of consideration] upon any local statute, or positive, fixed or ancient local usage: but they deduce the doctrine from the general principles of commercial law." *Swift*, 41 U.S. (16 Pet.) at 18. On questions of this kind, "the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, . . . what is the just rule furnished by the principles of commercial law to govern the case." *Id.* at 19. At the time, New York courts took the same approach. For example, in *Coddington v. Bay*, 20 Johns. 637 (N.Y. 1822), the New York Court for the Correction of Errors recognized "[t]he general rule . . . that

reason, the courts of each sovereign understood themselves free to exercise independent judgment to ascertain applicable customs and, when necessary, reach conclusions contrary to the decisions of the other. For example, in *Swift*, the Supreme Court looked to “the principles established in the general commercial law,” rather than to the decisions of New York state courts, in deciding a dispute between citizens of different states arising under the law merchant.<sup>216</sup> The Court noted that such decisions “are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed.”<sup>217</sup>

Likewise, New York courts considered themselves equally free to disregard the Supreme Court’s decisions on questions of general commercial law.<sup>218</sup> Just two years after *Swift*, counsel urged New York’s highest court to conform its decision “to the opinion of Mr. Justice Story in the recent case of *Swift v. Tyson*.”<sup>219</sup> Although recognizing that on “question[s] of commercial law, . . . it is desirable that there should be, as far as practicable, uniformity of decision, not only between the courts of the several states and of the United States, but also between our courts and those of England,” the court declined to follow the rule embraced in *Swift* and described the Supreme Court as a “tribunal, whose decisions are not of paramount authority” on such questions.<sup>220</sup>

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where negotiable paper is transferred for a valuable consideration, and without notice of any fraud, the right of the holder shall prevail against the true owner.” *Id.* at 644–45 (opinion of Woodworth, J.). The court considered the rule to be “well established,” *id.* at 647, and consistent with “the usual course of trade,” *id.* at 651 (opinion of Spencer, C.J.). That the court recognized this rule as part of the general law merchant is suggested by Chief Judge Spencer’s observation that the rule “is not only right in itself, but the contrary doctrine would destroy the circulation of notes, and would justly alarm the mercantile world.” *Id.*

216 *Swift*, 41 U.S. (16 Pet.) at 18.

217 *Id.* at 19.

218 See Fletcher, *supra* note 214, at 1561 (“State courts generally followed common law decisions by the United States Supreme Court, but they were quite explicit in stating that they did not do so because of any legal compulsion.”).

219 *Stalker v. M'Donald*, 6 Hill 93, 95 (N.Y. 1843).

220 *Id.* at 95, 112. Similarly, in deciding a question of general commercial law in 1822, the Pennsylvania Supreme Court declared that “[t]he decisions of the Supreme Court of the United States have no obligatory authority over this court, except in cases growing out of the constitution, of which this is not one.” *Waln v. Thompson*, 9 Serg. & Rawle 115, 122 (Pa. 1822). Although asserting the right to exercise independent judgment, the court recognized the “importance of preserving uniformity of commercial law, throughout the United States.” *Id.* Accordingly, Justice Tilghman stated, “I shall always be inclined to adopt [the] opinions [of the Supreme Court],

Taken in historical context, the *Swift* Court arguably did what New York law instructed—exercise independent judgment to ascertain the applicable rule of customary commercial law. For this reason, “*Swift* appears to have been regarded when it was decided”—not as an unconstitutional assumption of power by federal courts—but “as little more than a decision on the law of negotiable instruments.”<sup>221</sup> As long as New York courts purported to decide interstate commercial disputes according to a general body of customary commercial law rather than “local usage,” the Supreme Court’s approach in *Swift* was arguably consistent with the constitutional structure.

## 2. The Expansion of the *Swift* Doctrine

Although *Swift* may have been defensible when decided, two subsequent developments undermined its constitutional legitimacy. First, state courts gradually abandoned reliance on the general law merchant in favor of local commercial doctrines. Thus, even in cases like *Swift*, federal courts could no longer disregard state court decisions without exercising independent judgment as to the content of the law to be applied. Second, federal courts expanded the *Swift* doctrine to encompass an ever-growing list of legal questions historically governed by state law. The expanded *Swift* doctrine allowed federal courts to exercise an ever-increasing degree of policymaking discretion to decide questions traditionally governed by local law. These two developments ultimately led *Erie* to declare the *Swift* doctrine to be unconstitutional.

Following *Swift*, states increasingly regarded commercial law as an aspect of local law rather than part of the general law merchant. Both state courts and state legislatures participated in this shift. State courts gradually abandoned the ideal of a universal law merchant and began to formulate commercial doctrines as a matter of state law.<sup>222</sup> At the same time, state legislatures enacted specific statutes to govern commercial transactions in such states.<sup>223</sup> As a result, by the end of the nineteenth century, commercial law varied widely from state to

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rather than those of any foreign court, unless when I am well satisfied, it is in the wrong.” *Id.*

<sup>221</sup> Fletcher, *supra* note 214, at 1514.

<sup>222</sup> See Lyman D. Brewster, *The Promotion of Uniform Legislation*, 6 YALE L.J. 132, 140 (1897) (arguing for “statutory unity rather than [judicial] diversity, in matters of common interest”).

<sup>223</sup> See E. ALLAN FARNSWORTH & JOHN HONNOLD, CASES AND MATERIALS ON COMMERCIAL LAW 5 (4th ed. 1985) (“By 1890 every state had at least one statute on negotiable instruments . . .”).

state.<sup>224</sup> The resulting conflicts of law undermined interstate trade and gave rise to successful efforts to have states enact uniform commercial codes.<sup>225</sup> Such codes, of course, were designed to perform the function previously served by the now defunct law merchant—i.e., to encourage interstate trade through uniform commercial law.<sup>226</sup> Notwithstanding the states' abandonment of the law merchant, federal judges continued to apply *Swift* and disregard state court decisions in favor of their own conceptions of general commercial law.

Equally significant, federal courts expanded the *Swift* doctrine well beyond its commercial origins to encompass numerous questions traditionally governed by local law. One of the most significant steps in this expansion was the Court's decision to disregard state tort law in favor of so-called "general law." In 1862, in a case concerning liability for negligence, the Court declared that "where private rights are to be determined by the application of common law rules alone, this Court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions."<sup>227</sup> This trend continued and by the time *Erie* was decided, federal courts claimed the right to exercise independent judgment with respect to dozens of historically local questions including negligence, punitive damages, and property rights.<sup>228</sup> Unlike commercial disputes, such matters had never been considered by states to be governed by general law.

These two developments—the continued application of the *Swift* doctrine to commercial questions and its expansion to historically local matters—severely undermined the legitimacy of the *Swift* doctrine. Justice Field was one of the first members of the Court to challenge the constitutionality of the doctrine. In *Baltimore & Ohio Railroad Co. v. Baugh*,<sup>229</sup> he denounced the Court's decision to disregard the Ohio common law of fellow servant liability in favor of so-called "general law." Although acknowledging that he had applied *Swift* in the past,

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224 See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 355 (1973) (stating that "each state from Maine to the Pacific was a petty sovereignty, with its own brand of law").

225 See *id.* ("By 1900, [the uniform Negotiable Instruments Law] had been widely enacted . . .").

226 See Brewster, *supra* note 222, at 134 ("[G]reat care is taken to preserve the use of words which have had repeated legal constructions and become recognized terms in the Law Merchant.").

227 *Chicago v. Robbins*, 67 U.S. (2 Black) 418, 428–29 (1862).

228 See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 75–76 (1938) (detailing the expansion of the *Swift* doctrine); TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 71 (1981) ("[T]he federal judiciary continued to enlarge the body of general law so that by 1890 it included some 26 doctrines . . .").

229 149 U.S. 368 (1893).



Justice Field believed that “there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States.”<sup>230</sup> Justice Holmes embraced the same position, characterizing the *Swift* doctrine as “an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.”<sup>231</sup>

### 3. The Unconstitutionality of the *Swift* Doctrine

By 1938, the *Swift* doctrine had become untenable. Although neither party asked it to do so, the Supreme Court overruled *Swift* in *Erie Railroad Co. v. Tompkins*.<sup>232</sup> According to the Court, “in applying the [*Swift*] doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.”<sup>233</sup> Commentators have long debated the precise nature of the constitutional defect found in *Erie*.<sup>234</sup> Careful review suggests that the Court became convinced that the *Swift* doctrine had become little more than an excuse for federal courts to exercise will instead of judgment in contravention of federal lawmaking procedures, the political safeguards of federalism, and the Supremacy Clause. As discussed below, these considerations suggest that *Erie* rests on mutually reinforcing principles of separation of powers and federalism.

Several alternative constitutional rationales merit only brief discussion. For example, some commentators have suggested that *Erie*’s constitutional analysis should be considered dictum, and that the decision is best understood to rest solely on the Court’s interpretation of section 34 of the Judiciary Act of 1789,<sup>235</sup> also known as the Rules of Decision Act.<sup>236</sup> Although it is true that the Court examined section 34 and overruled “the construction given to it by the [*Swift*]

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230 *Id.* at 401 (Field, J., dissenting).

231 *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

232 304 U.S. 64.

233 *Id.* at 80.

234 See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 5.3.5, at 315 (4th ed. 2003) (“The constitutional basis for the *Erie* decision has confounded scholars.”); Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 676 (1998) (noting that *Erie*’s “holding has been subject to disagreement and controversy over the years”).

235 Ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2000)).

236 See Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 278 (1946).

Court,"<sup>237</sup> the Court expressly declined to rest its decision on statutory grounds. According to the Court: "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so."<sup>238</sup> Thus, according to the Court, the constitutional rationale was necessary to support the judgment.

Other commentators have suggested that the equal protection "component" of the Fifth Amendment supplies a plausible basis for the Supreme Court's decision in *Erie*,<sup>239</sup> relying on the Court's statement that "the [*Swift*] doctrine rendered impossible equal protection of the law."<sup>240</sup> First, the structure of the Court's opinion appears to foreclose this reading. *Erie*'s reference to "equal protection" appears in a preliminary section of the opinion describing the "political and social" defects of the *Swift* doctrine rather than the section specifically explaining "the unconstitutionality of the course pursued."<sup>241</sup> Second, at the time *Erie* was decided, the Court had not yet interpreted the Fifth Amendment's Due Process Clause to (reverse) incorporate an equal protection component applicable to the federal government.<sup>242</sup> The unavailability of an equal protection claim in 1938 suggests that *Erie* used the phrase solely in a broader, nonconstitutional sense.

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237 *Erie*, 304 U.S. at 72.

238 *Id.* at 77–78; see CHEMERINSKY, *supra* note 234, § 5.3.5, at 314 ("Justice Brandeis made it clear that the constitutional argument was integral to the Court's holding [in *Erie*] . . .").

239 See, e.g., John R. Leathers, *Erie and Its Progeny as Choice of Law Cases*, 11 Hous. L. REV. 791, 795–96 (1974) (discussing the Fifth Amendment's equal protection component as a possible basis for the Court's decision in *Erie*).

240 *Erie*, 304 U.S. at 75.

241 *Id.* at 74, 77–78.

242 See CHEMERINSKY, *supra* note 234, § 5.3.5, at 314 (stating that *Erie*'s reference to equal protection "appears to be a rhetorical rather than a constitutional argument because the Supreme Court had not yet applied the requirements of equal protection to the federal government"). On the development of equal protection jurisprudence, compare *LaBelle Iron Works v. United States*, 256 U.S. 377, 392 (1921) (rejecting an equality based challenge on the ground that "[t]he Fifth Amendment has no equal protection clause"), with *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (subjecting federal racial classification to equal protection scrutiny for the first time). See also Bradford R. Clark, Note, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969, 1970–72 (1984) (discussing the origin and development of reverse incorporation).

Finally, some might read *Erie* as resting on traditional notions of limited federal power under the Tenth Amendment.<sup>243</sup> The Court's opinion does, after all, contain various references to "'the autonomy and independence of the States,'"<sup>244</sup> the rights "reserved by the Constitution to the several States,"<sup>245</sup> the limited matters "specifically authorized or delegated to the United States,"<sup>246</sup> and Congress's lack of "power to declare substantive rules of common law applicable in a State."<sup>247</sup> This reading of the opinion, however, is too simplistic. In light of the Court's contemporaneous decisions broadly construing the Commerce Clause,<sup>248</sup> it seems unlikely that *Erie* meant to suggest that Congress lacked power to enact rules to govern the question before the Court—i.e., the duty of care owed by an interstate railroad to pedestrians walking along the right-of-way. In any event, any suggestion to this effect was dictum because Congress had not in fact enacted an applicable federal statute.<sup>249</sup>

Looking beyond these explanations of the *Erie* opinion, one can identify a deeper constitutional flaw with the *Swift* doctrine. Over time, the doctrine evolved into little more than an excuse for federal courts to exercise broad policymaking discretion on behalf of society unchecked by the Constitution's carefully crafted lawmaking proce-

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243 See Goldsmith & Walt, *supra* note 234, at 677; Benno Schmidt, *Substantive Law Applied by the Federal Courts—Effect of Erie R. Co. v. Tompkins*, 16 TEX. L. REV. 512, 520–24 (1938).

244 *Erie*, 304 U.S. at 78 (quoting *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

245 *Id.* at 80.

246 *Id.* at 79.

247 *Id.* at 78.

248 See *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (holding that Congress's power under the Commerce Clause extends to certain intrastate activities that, in aggregate, affect interstate commerce); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (holding that Congress has the power to exercise control over intrastate activities that have a close and substantial relation to interstate commerce); Clark, *supra* note 205, at 1258 (noting the Court's broad grant of federal authority in its Commerce Clause cases and its contemporaneous denial of similar authority in *Erie*); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1684 n.10 (1974) (suggesting that Congress could have used its power under the Commerce Clause to enact a rule of decision contrary to the result in *Erie*).

249 Chief Justice Stone, who joined the *Erie* opinion, apparently held this view: "[I] do not think it is at all clear that Congress could not apply (enact) substantive rules of law to be applied by federal courts. I think that *Erie Railroad Co. v. Tompkins* did not settle that question, notwithstanding some unfortunate dicta in the opinion.'" ALPHEUS THOMAS MASON, HARLAN FISKE STONE 480–81 n.† (1956) (quoting Letter from Harlan Stone to Owen J. Roberts (Jan. 3, 1941)); see also *id.* at 480 ("Beyond [the federal courts' unconstitutional assumption of powers] . . . it was unnecessary to go.") (quoting Letter from Harlan Stone to Felix Frankfurter (Apr. 29, 1938))).

dures. Such discretion raised separation of powers concerns because it allowed the life-tenured judiciary to encroach upon the authority of Congress and the President. At the same time, such discretion raised federalism concerns because it permitted federal courts to displace state law outside the Supremacy Clause and the political safeguards of federalism built into the constitutional structure to protect the governance prerogatives of the states.<sup>250</sup> By circumventing these safeguards, the expanded *Swift* doctrine amounted to “‘an unconstitutional assumption of powers by courts of the United States.’”<sup>251</sup>

*Erie*’s reasoning suggests that its animating principle was that agents of the federal government have the power to override background principles of state law only if they follow one of the lawmaking methods incorporated by the Supremacy Clause. In this way, the Court upheld the structural safeguards built into those procedures—including the Founders’ decision to give the Senate the right to participate in adopting (and therefore to veto) all forms of “the supreme Law of the Land.” Such safeguards, of course, were designed to prevent promiscuous and insufficiently considered displacement of state law by federal actors. *Erie* ensured that the judiciary would not circumvent such safeguards by affirming that federal courts lack independent policymaking discretion to formulate rules of decision capable of displacing state law.

Accordingly, it is not surprising that, in explaining how courts applying the *Swift* doctrine “have invaded rights . . . reserved by the Constitution to the several States,”<sup>252</sup> the *Erie* Court began by paraphrasing the Supremacy Clause: “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”<sup>253</sup> The Court’s statement presupposes that the Supremacy Clause provides the exclusive basis in the Constitution for displacing state law.<sup>254</sup> Under the Clause, the federal government may displace state law only by successfully adopting an

250 See *supra* notes 67–91 and accompanying text.

251 *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

252 *Id.* at 80.

253 *Id.* at 78. Of course, the Supremacy Clause refers not only to the “Constitution” and “Laws,” but also to “Treaties.” See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

254 See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234 (2000) (“As the Supreme Court and virtually all commentators have acknowledged, the Supremacy Clause is the reason that valid federal statutes trump state law.”).

applicable provision of "[t]his Constitution," "the Laws of the United States . . . made in Pursuance thereof," or "Treaties made . . . under the Authority of the United States."<sup>255</sup> The Constitution, in turn, prescribes three distinct sets of "finely wrought and exhaustively considered"<sup>256</sup> procedures to govern the adoption of each source of law recognized by the Supremacy Clause.<sup>257</sup> These procedures assign federal lawmaking exclusively to the political branches of the federal government and the states. By design, federal courts were given no role in the process. *Erie* acknowledged this omission by emphasizing that "no clause in the Constitution purports to confer . . . power upon the federal courts"<sup>258</sup> "to declare substantive rules of common law applicable in a State."<sup>259</sup>

The *Swift* doctrine undermined these features of the constitutional structure by allowing federal courts to displace state law unconstrained by federal lawmaking procedures, the political safeguards of federalism, and the Supremacy Clause. In other words, the *Swift* doctrine was "unconstitutional" because it permitted judges to disregard traditional principles of state law in favor of their own independent notions of sound public policy. As Justice Field put it, the "general law" applied by federal courts under the *Swift* doctrine was "little less than what the judge advancing the doctrine [thought] at the time should be the general law on a particular subject."<sup>260</sup> Allowing federal courts to exercise this degree of policymaking discretion was inconsistent with key aspects of the constitutional structure and interfered with "'the autonomy and independence of the States.'"<sup>261</sup> Thus, *Erie* stressed that "[t]he common law so far as it is enforced in a State . . . is not the common law generally but the law" as declared by the courts of that state.<sup>262</sup> As Henry Monaghan explained, "federal judicial power to displace state law is not coextensive with the scope of dormant congressional power. Rather, the court must point to some source, such as a statute, treaty, or constitutional provision, as author-

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255 U.S. CONST. art. VI, cl. 2.

256 *INS v. Chadha*, 462 U.S. 919, 951 (1983).

257 See U.S. CONST. art. I, § 7, cl. 2 (requiring bicameral passage by the House and Senate and presentment to the President before a bill "becomes a Law"); *id.* art. II, § 2, cl. 2 (authorizing the President and two-thirds of the Senate "to make Treaties"); *id.* art. V (authorizing two-thirds of the House and Senate and three-fourths of the states to adopt "Amendments to this Constitution").

258 304 U.S. at 78.

259 *Id.*

260 *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting).

261 *Erie*, 304 U.S. at 78 (quoting *Baugh*, 149 U.S. at 401 (Field, J., dissenting)).

262 *Id.* at 79.

ity for the creation of substantive federal law.”<sup>263</sup> In the absence of such authority, the exercise of judicial discretion to override state law constitutes “‘an unconstitutional assumption of powers.’”<sup>264</sup>

#### IV. REASSESSING EIGHTH AMENDMENT DISCRETION

The Supreme Court’s recent embrace of broad judicial discretion under the Cruel and Unusual Punishments Clause of the Eighth Amendment raises many of the same concerns under the constitutional structure that previously led the Court to abandon both federal common law crimes and the *Swift* doctrine. The Court now claims the right to set aside traditional state law punishments in the name of the Eighth Amendment based on the Justices’ own “independent judgment” as to what constitutes “‘the evolving standards of decency that mark the progress of a maturing society.’”<sup>265</sup> The Court has made no attempt to ground this assertion of policymaking discretion in the text or history of the Constitution, and apparently failed to consider the structural considerations that led earlier Courts to abandon similar doctrines of judicial discretion.

It is possible, of course, to imagine that the founders of a constitution might wish to confer broad policymaking discretion on judges insulated from the political process. The question, however, is whether inferring such a delegation is appropriate in contexts in which our Constitution does not plainly grant it. As discussed, the constitutional structure, key aspects of the ratification debates, and several notable historical precedents all counsel against interpreting ambiguous provisions of the Constitution to confer open-ended policymaking discretion upon federal courts. Such discretion would allow the judiciary to exercise will instead of judgment and would undercut

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263 Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 11–12 (1975).

264 *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). Of course, there are other historical instances in which the Court first embraced broad judicial discretion to set aside state law and then abandoned such discretion as illegitimate. Compare *Lochner v. New York*, 198 U.S. 45, 57 (1905) (invalidating a New York law regulating the hours of bakers as inconsistent with the liberty of contract protected by the Due Process Clause of the Fourteenth Amendment), *abrogated by* *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and *Atkins v. Children’s Hosp.*, 261 U.S. 525, 552 (1923) (invalidating a District of Columbia law establishing minimum wages for women), *overruled by* *W. Coast Hotel*, 300 U.S. 379, *with* *W. Coast Hotel*, 300 U.S. at 400 (overruling *Atkins* and upholding a state minimum wage law for women under the Due Process Clause).

265 *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

the political safeguards of federalism built into the Supremacy Clause and federal lawmaking procedures. In view of these structural considerations—reinforced over time by the settled understanding reflected in the historical instances discussed above—proponents of broad judicial discretion under the Eighth Amendment bear the burden of establishing that the provisions in question unambiguously delegate such authority to federal courts.

Article III is illustrative. Proponents of both federal common law crimes and general common law under *Swift* simply assumed that Article III delegated authority to federal courts to embrace these doctrines. For example, in defending federal common law crimes, Justice Story explained:

[T]he clause, that “the judicial power shall extend to all cases in law and equity arising under the constitution,” &c. is inexplicable, without reference to the common law; and the extent of this power must be measured by the powers of courts of law and equity, and exercised and established by that system.<sup>266</sup>

Justice Story did not believe that federal courts would have discretion to recognize any and all common law offenses. Rather, he assured skeptics that judges would be constrained by “the principles of the common law, taken in connexion with the constitution.”<sup>267</sup> This meant that federal courts could recognize only “public offences” that “when directed against the United States . . . must upon principle be deemed offences against the United States.”<sup>268</sup> Under this standard, Justice Story concluded that, “independent of any statute,”

treasons, and conspiracies to commit treason, embezzlement of the public records, bribery and resistance of the judicial process, riots and misdemeanors on the high seas, frauds and obstructions of the public laws of trade, and robbery and embezzlement of the mail of the United States, would be offences against the United States.<sup>269</sup>

Likewise, in defending the *Swift* doctrine, serious scholars have argued that by granting federal courts diversity jurisdiction, Article III authorized federal courts to disregard “aberrational state laws” and “creat[e] special substantive rules applicable in multistate cases.”<sup>270</sup>

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266 *United States v. Coolidge*, 25 F. Cas. 619, 619 (C.C.D. Mass. 1813) (No. 14,857), *rev’d*, 14 U.S. (1 Wheat.) 415 (1816).

267 *Id.* at 620.

268 *Id.*

269 *Id.* In such cases, Justice Story was convinced that “the common law can be referred to, and made the rule of decision in criminal trials in the courts of the United States.” *Id.* at 621.

270 Patrick J. Borchers, *The Origins of Diversity Jurisdiction, The Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 81 (1993); *see*

In essence, they believe that "Article III's purpose to provide a neutral forum protecting nonresidents from discrimination justified *Swift* and its progeny."<sup>271</sup> At the same time, during the *Swift* era, the Supreme Court maintained that its decisions were not based on the subjective preferences of the Justices, but rather on Article III's incorporation of an objective body of "general law."<sup>272</sup>

Notwithstanding these arguments, the Supreme Court ultimately abandoned both federal common law crimes and the *Swift* doctrine as inconsistent with the proper role of federal courts in the federal system. Although the open-ended language of Article III—"the judicial Power"—can be read to encompass these doctrines, the Court found this reading inadmissible because it would have conferred more discretion on federal courts than the constitutional structure suggests they should exercise.<sup>273</sup> For example, notwithstanding Justice Story's assurances, the Court ultimately agreed with Madison's objection that

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Henry Schofield, *Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts*, 4 ILL. L. REV. 533, 537–38 (1910).

271 Goldsmith & Walt, *supra* note 234, at 683.

272 See *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 372–73 (1893); *Burgess v. Seligman*, 107 U.S. 20, 34 (1883); *Watson v. Tarpley*, 59 U.S. (18 How.) 517, 520–21 (1855).

273 One potential counterexample is federal common law—rules of decision that purport to have the force of federal law, but whose content cannot be traced by traditional methods of interpretation to the Constitution, laws, and treaties of the United States. See Clark, *supra* note 205, at 1247. Even here, however, the Supreme Court has rejected open-ended judicial lawmaking and attempted to limit federal common law to "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes . . . , and admiralty cases." *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981). Many so-called federal common law rules, moreover, have arguably been mischaracterized and are actually "consistent with, and frequently required by, the constitutional structure." Clark, *supra* note 205, at 1251; cf. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 35 (1985) (suggesting that some federal common lawmaking—"delegated" and "preemptive" lawmaking—is legitimate because authorized by Congress). Even admiralty—the most entrenched enclave of federal common law dating back to *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917)—has recently been called into question. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 459 (1994) (Stevens, J., concurring in part and concurring in the judgment) ("*Jensen* and its progeny represent an unwarranted assertion of judicial authority to strike down or confine state legislation . . . without any firm grounding in constitutional text or principle."); Clark, *supra* note 205, at 1360 ("[T]he judiciary's imposition of 'general maritime law' under *Jensen* arguably intrudes upon the constitutional authority of Congress and the states no less than the federal courts' application of 'general commercial law' under *Swift*"); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 279 (1999) ("[W]e would do better to follow *Erie* by largely abandoning the effort to construct federal common law rules in admiralty cases that arise within state territorial waters . . .").



giving federal judges discretion to pick and choose among federal common law crimes “would, in fact, erect them into legislators.”<sup>274</sup> Similarly, *Erie* rejected as fallacy “the assumption that there is ‘a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.’”<sup>275</sup> Once this fallacy was exposed, *Erie* saw the *Swift* doctrine as little more than an excuse for judicial lawmaking, and declared that its application “invaded rights which in our opinion are reserved by the Constitution to the several States.”<sup>276</sup> The Court’s resolution of these significant historical controversies suggests that unless the Constitution unambiguously confers open-ended judicial discretion to displace state law, the constitutional structure precludes it.

The Supreme Court’s recent Eighth Amendment precedent takes a very different approach. Like proponents of federal common law crimes and the *Swift* doctrine, the Court embraced broad judicial discretion in the name of a provision of the Constitution (in this case, the Cruel and Unusual Punishments Clause) without any specific textual or historical showing that the provision was meant to delegate such discretion.<sup>277</sup> Unlike earlier doctrines of judicial discretion, however, the Court’s recent Eighth Amendment jurisprudence makes no pretense about the nature of the discretion it assigns to judges. Rather, the Justices now openly claim for themselves the right to depart from the “objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question,”<sup>278</sup> in favor of their own independent judgment concerning the morality, efficacy, and propriety of a given punishment in today’s society.<sup>279</sup>

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274 Madison, *supra* note 14, at 381.

275 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

276 *Id.* at 80. See generally Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1474–93 (1997).

277 One potential distinction between *Roper* and earlier doctrines of judicial discretion—such as the *Swift* doctrine and federal common law crimes—is that the former arose in the context of individual rights whereas the latter dealt with the constitutional structure. Any such distinction, however, fails to address the structural and historical case against broad judicial discretion. Moreover, the distinction is anachronistic because the Founders understood the constitutional structure and the Bill of Rights to be mutually reinforcing sources of individual liberty. See Clark, *supra* note 92, at 333–48.

278 *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

279 See *supra* notes 44–62 and accompanying text.

Even assuming that the Court's assessment of these complex policy matters is correct, its assertion that the Eighth Amendment gives federal judges open-ended discretion to make such judgments on behalf of society is at least questionable in light of the constitutional structure. Echoing *Swift*-era dissents, today's dissenting Justices charge that the Court has substituted "its own 'inevitably subjective judgment' on how best to resolve this difficult moral question for the judgments of the Nation's democratically elected legislatures."<sup>280</sup> Given that the constitutional structure takes great pains to channel policymaking discretion to politically accountable officials constrained by "finely wrought and exhaustively considered" procedures,<sup>281</sup> Justices should refrain from imposing their will on society unless the Constitution unambiguously instructs them to do so.

One might argue that the Supreme Court's earlier precedents rejecting federal common law crimes and the *Swift* doctrine represent little more than an interpretation of Article III as such. This reading, however, ignores the broader structural underpinnings of those decisions. Although Article III had a direct bearing on these issues, both the Court and the public saw the doctrines as raising fundamental questions about the nature of judicial discretion under the constitutional structure. In denouncing federal common law crimes, for example, Madison warned that the doctrine "would confer on the judicial department a discretion little short of a legislative power."<sup>282</sup> Similarly, in rejecting the doctrine, Justice Johnson objected that if federal courts are free to adopt federal common law crimes, they must "erect themselves into legislators in the selection."<sup>283</sup> And, in denouncing the *Swift* doctrine, Justice Field observed that the applicable rules of decision were "little less than what the judge advancing the doctrine [thought] at the time should be the general law on a particular subject."<sup>284</sup> In light of the Supremacy Clause and the associated procedural safeguards of federalism, *Erie* rejected such discretion as "'an unconstitutional assumption of powers by courts of the United

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280 *Roper*, 543 U.S. at 607 (O'Connor, J., dissenting) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 854 (1988) (O'Connor, J., concurring in the judgment)); see also *Atkins v. Virginia*, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting) ("Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members."); *id.* at 348 ("The arrogance of this assumption of power takes one's breath away.").

281 *INS v. Chadha*, 462 U.S. 919, 951 (1983).

282 Madison, *supra* note 14, at 380.

283 Trial of William Butler for Piracy 21 (C.C.D. S.C. 1813) (copy on file with the Notre Dame Law Review).

284 *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting).

States.’”<sup>285</sup> Given the *systemic* nature of the structural safeguards underlying these decisions, it is difficult to conclude that judicial discretion asserted under other provisions is logically distinguishable from analogous discretion previously claimed under Article III. Accordingly, the Court should not infer broad judicial discretion in the absence of an express constitutional delegation.<sup>286</sup>

In this regard, it is significant that the Supreme Court’s novel approach to the Eighth Amendment makes no attempt to justify the exercise of policymaking discretion by reference to either the text or history of the Cruel and Unusual Punishments Clause.<sup>287</sup> My purpose here is not to question that basic approach, but rather to identify the appropriate set of background assumptions that the Court should bring to bear from the overall constitutional structure when it is not relying on the specific historical understanding of the Clause. In other words, I take the Court’s basic framework of evolving standards of decency as my starting point and then ask which conception of that framework better comports with the constitutional structure as a whole. That effort, I should add, is not contradicted by the Amendment itself. It provides that “cruel and unusual punishments” shall not be inflicted.<sup>288</sup> Although this is not the occasion to consider the original understanding of that phrase, it is safe to say at least that the Clause was drafted in sufficiently open-ended terms so as to allow the

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285 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

286 Article V itself also tends to refute the case for any inherent distinction between judicial discretion under Article III and the Eighth Amendment. The Supremacy Clause’s reference to “[t]his Constitution” means that all provisions of the original Constitution displace state law when the two conflict. Article V self-consciously ensures that future amendments would also trigger the Clause by proclaiming that amendments adopted in accordance with its intricate and cumbersome procedures “shall be valid to all Intents and Purposes, as Part of *this Constitution*.” U.S. CONST. art. V (emphasis added). In the abstract, therefore, it should matter little whether courts claim discretion under Article III or a constitutional amendment. In either case, courts must point to a clear delegation in order to overcome the implications of the Supremacy Clause and federal lawmaking procedures.

287 Of course, courts and commentators frequently disagree over how best to interpret and apply constitutional provisions adopted long ago in light of today’s changed circumstances. Compare Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 130 (arguing in favor of radical translation), with Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1171 (1998) (suggesting courts should consider changed circumstances, but adopt rules “consistent with the constitutional text”).

288 U.S. CONST. amend. VIII.

Supreme Court some leeway in its interpretation.<sup>289</sup> The existence of a range of permissible interpretations, however, does not mean that the text will bear any construction. Thus, before invalidating a particular penalty, the Court must explain why it constitutes “cruel and unusual” punishment within the meaning of the Eighth Amendment.

In ascertaining whether a particular punishment is “cruel,” the Supreme Court looks to the evolving standards of decency that mark the progress of a maturing society. In order to harmonize this approach with the constitutional structure, the Court should return to an objective test and give due deference to legislative judgments. The Court’s approach to the related question of proportionality is instructive. Although some Justices dispute the existence of a proportionality requirement under the Cruel and Unusual Punishments Clause,<sup>290</sup> others apply “a ‘narrow proportionality principle’” in noncapital cases.<sup>291</sup> For example, in recently upholding California’s “Three Strikes and You’re Out” law, Justice O’Connor, joined by Chief Justice Rehnquist and Justice Kennedy, signaled their willingness to invalidate a sentence only if it “‘is grossly disproportionate to the severity of the crime.’”<sup>292</sup> This narrow approach was grounded in part on Justice Kennedy’s earlier concurrence insisting “‘that proportionality review be guided by objective factors.’”<sup>293</sup> Justice Kennedy stressed that “‘[o]ur federal system recognizes the independent power of a State to articulate societal norms through criminal law.’”<sup>294</sup> On this assumption, the best indicators of whether a particular punishment satisfies evolving standards of decency are the laws adopted by the people’s elected representatives. In *Roper*, Justice Kennedy arguably aban-

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289 See *supra* notes 24–28 and accompanying text.

290 See *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in the judgment); *id.* at 32 (Thomas, J., concurring in the judgment).

291 *Id.* at 20 (plurality opinion) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). For an insightful examination of the origins of proportionality review, see Margaret Raymond, “No Fellow in American Legislation”: *Weems v. United States and the Doctrine of Proportionality*, 30 Vt. L. REV. (forthcoming 2006).

292 *Ewing*, 538 U.S. at 21 (quoting *Rummel v. Estelle*, 445 U.S. 263, 271 (1980)).

293 *Id.* at 23 (quoting *Harmelin*, 501 U.S. at 1101 (Kennedy, J., concurring in part and concurring in the judgment)). The other principles identified by Justice Kennedy were “‘the primacy of the legislature, the variety of legitimate penological schemes, [and] the nature of our federal system.’” *Id.* (quoting *Harmelin*, 501 U.S. at 1101).

294 *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)); see *id.* at 1000 (“‘Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.’” (quoting *Rummel*, 445 U.S. at 282)).

doned this approach by disregarding the judgment of twenty state legislatures concerning the propriety of the juvenile death penalty in favor of his own independent judgment.

Of course, even if a punishment is "cruel," it must also be "unusual" to trigger scrutiny under the Eighth Amendment. The Supreme Court often analyzes this issue by asking whether there is a "national consensus" against the punishment in question. Because we have a federal system with fifty states, there will almost always be some degree of disagreement among the states regarding the proper uses of particular punishments. The mere fact that some states abandon a punishment does not necessarily render it "unusual" within the meaning of the Amendment. At some point, however, a punishment may become so rare that it satisfies this requirement. The crucial question, therefore, is how many states must abolish a punishment in order for a court to find it "unusual" under the Clause?

Certainly, there is room for debate, but here again the constitutional structure may suggest a tentative answer. Because Article V requires the approval of three-fourths of the states to amend the Constitution, construing ambiguous constitutional provisions to authorize courts to invalidate punishments based on the views of fewer than three-quarters of the states would arguably contradict the spirit, if not the letter, of Article V. As Henry Monaghan has explained, "Article V was designed to permit a very small number of states (currently thirteen) containing but a fraction of the total national population to block constitutional change."<sup>295</sup> From this perspective, it would be odd to interpret the Eighth Amendment to invalidate a traditional punishment when at least thirteen states continue to authorize the practice.<sup>296</sup>

In this regard, the Supreme Court's recent Eighth Amendment jurisprudence arguably pays inadequate attention to both the constitutional text and the constitutional structure. As discussed, twenty states continued to authorize the juvenile death penalty when the Court invalidated the punishment as "cruel and unusual."<sup>297</sup> In light of Article V and the implications of the constitutional structure, the

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<sup>295</sup> Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 125 (1996).

<sup>296</sup> Of course, even if three-quarters of the states choose to abandon a particular punishment, it does not automatically follow that they would vote to ratify a constitutional amendment prohibiting the practice nationwide. It is possible that some states might want to retain their ability to reinstate the punishment in the future. Others might wish to preserve the power of sister states to resolve such questions for themselves.

<sup>297</sup> See *supra* notes 49–50 and accompanying text.

Court should have required a greater degree of consensus among the states before invalidating the practice. Indeed, the Court's approach seems to read the term "unusual" out of the Eighth Amendment altogether by claiming authority to invalidate punishments it finds penologically or morally deficient, regardless of how many states permit the practice.<sup>298</sup> This degree of judicial discretion not only contradicts the text, but also allows federal courts to exercise will instead of judgment contrary to the implications of constitutionally prescribed lawmaking procedures, the political safeguards of federalism, and the Supremacy Clause.

For similar reasons, the constitutional structure suggests that the Court's reliance on international law to displace state law was also questionable.<sup>299</sup> In support of its decision to invalidate the juvenile death penalty, the Court invoked several unratified international agreements, including Article 37 of the United Nations Convention on the Rights of the Child, which prohibit the execution of juvenile offenders.<sup>300</sup> The Constitution requires the concurrence of the President and two-thirds of the Senate to adopt a treaty. Presidents of both parties and the Senate have consistently refused to adopt the Convention as a treaty partly because they wished to preserve the states' traditional control over the death penalty.<sup>301</sup> In addition, as Curtis Bradley had pointed out, "the United States has indicated that, if and when it does ratify these treaties, it will attach a reservation declining to agree

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298 Vicki Jackson has suggested that the *Roper* Court may have invoked foreign law to satisfy the "unusualness" requirement of the Eighth Amendment by "[d]escribing the 'stark reality' that the United States was now virtually alone in formally approving the death penalty for juveniles." Jackson, *supra* note 62, at 127 (quoting *Roper v. Simmons*, 543 U.S. 551, 575 (2005)). Elsewhere, however, Professor Jackson correctly observes that "the structure of the Court's argument supports its description of the use of foreign law as confirmatory, rather than integral to its analysis." *Id.* at 116 n.30.

299 Reliance on foreign law to interpret the Constitution may also implicate principles of democratic self-government under the Constitution. For example, Jed Rubenfeld has observed that the "Constitution is supposed to reflect our own fundamental legal and political commitments—not a set of commitments that all civilized nations must share," and that it is "the self-givenness of the Constitution, not its universality, that gives it authority as law." Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971, 2006 (2004).

300 *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

301 See Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 512 (2002) (noting that the United States has not ratified the Convention on the Rights of the Child). See generally Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000) (discussing the United States' practice of ratifying international human rights treaties subject to reservations, understandings, and declarations designed to preserve the governance prerogatives of the states).

to the ban on juvenile executions.”<sup>302</sup> This is a textbook example of the political safeguards of federalism at work. The Court circumvented these safeguards to the extent that it relied on unratified—and apparently unratifiable—provisions of international agreements to invalidate the juvenile death penalty. At least when the President and the requisite proportion of the Senate have refused to adopt an international prohibition, the Court should respect the results of the political process and disregard such prohibitions.<sup>303</sup>

### CONCLUSION

The Supreme Court now claims extraordinary authority under the Eighth Amendment to exercise “independent judgment” to decide the propriety of a particular punishment on behalf of society. Judicial discretion on this scale necessarily raises concerns related to separation of powers and democratic legitimacy. But such discretion also implicates various features of the constitutional structure—federal lawmaking procedures, the political safeguards of federalism, and the Supremacy Clause—designed to preserve the governance prerogatives of the states. Without a stronger showing that the Eighth Amendment confers this degree of judicial discretion, it appears that the Court’s current approach—like its earlier embrace of federal common law crimes and the *Swift* doctrine—permits courts to exercise will rather than judgment and thus represents “‘an unconstitutional assumption of powers by courts of the United States.’”<sup>304</sup>

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302 Bradley, *supra* note 301, at 513.

303 See *id.* at 543 (“If a U.S. court disregarded the U.S. reservation and enforced the juvenile death penalty provision, it would be treating as supreme law of the land a treaty provision that had never been approved by the president and Senate.”).

304 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).